Circuit-Wise, Inc. *and* United Electrical, Radio and Machine Workers of America (UE). Cases 39–CA–3885, 34–CA–3975, 34–CA–4173–1, 34–CA–4173–2, 34–CA–4174, 34–CA–4175, 34–CA–4189, 34–CA–4199, 34–CA–4200, 34–CA–4207, 34–CA–4216, 34–CA–4305, 34–CA–4330, 34–CA–4352, 34–CA–4487, 34–CA–4500, and 34–CA–4583

March 24, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 17, 1991, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief to the exceptions taken by the General Counsel. The General Counsel filed exceptions, a supporting brief, and an answering brief. The Charging Party filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

1. The General Counsel and the Charging Party except, inter alia, to the judge's failure to find that the Respondent violated Section 8(a)(5) and (1) of the Act by excluding the Union from its problem-solving procedure and by dealing directly with employees regarding their grievances and violated Section 8(a)(3) and (1) by conditioning use of the problem-solving procedure on an employee's willingness to forgo union representation. We find merit in these exceptions.

For some time prior to the Union's arrival, the Respondent maintained a problem-solving procedure under which an employee with a complaint could bring his ''grievance'' through a series of steps from depart-

[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to timely furnish to the Union requested information concerning replacement employees after the strike commenced, by withdrawing recognition from a portion of the bargaining unit encompassing waste water technicians, and by unilaterally changing work schedules of certain of its employees in June 1989; that the Respondent violated Sec. 8(a)(3) and (1) of the Act by verbally counseling and issuing a written warning to Frank Blazi because of his union activities, by issuing a warning to Javier Cruz because of his union activities, by issuing warnings and a 3-day suspension to Lonnie Hailey because of his union activities, by giving Rose Puccino a 3-day suspension because of her union activities, and by failing to pay accrued vacation benefits to strikers; that the Respondent violated Sec. 8(a)(1) of the Act by preventing an employee designated by the Union from speaking with or questioning other employees during safety inspection tours conducted by the Occupational, Safety and Health Administration, by enforcing a no-solicitation rule disparately and discriminatorily against employees who engaged in union activities, and notifying Joseph Wingate that his absence from work on February 24, 1989, was unexcused despite advance notice that Wingate would be attending a union meeting; and that the strike which commenced on September 11, 1989, was an unfair labor practice strike.

The Respondent, the General Counsel, and the Charging Party have each excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that Lennora Daniels was discriminatorily discharged, we find it unnecessary to rely on his finding of disparate treatment of employee Bernard Young. We also find it unnecessary to pass on the judge's finding that the parties were at impasse on August 1, 1989, or that the Respondent's July 18 final offer was never withdrawn. Finally, in adopting the judge's finding that the Respondent violated the Act by unilaterally removing waste water technicians from the bargaining unit, we find it unnecessary to pass on the General Counsel's alternate theory with regard to this issue.

The judge concluded that the Respondent unlawfully refused to provide the Union with certain requested information relevant to the evaluation of the Respondent's proposal to pay employees a quality bonus. The judge, however, failed to order the Respondent to furnish to the Union requested information relating to average lots and yield for fiscal year 1989. As this information is necessary for calculating the existence and amount of any improvement over the 1988 base year, which in turn determines the bonus pool, we find this information relevant to evaluating and assessing the Respondent's bonus proposal, and we shall modify the Order accordingly. We have further modified the Order to provide a make-whole remedy for the waste water technicians from whom the Respondent unlawfully withdrew recognition.

[3] The judge found that the Respondent violated Sec. 8(a)(3) of the Act by discriminatorily denying an outstanding performance rating to employee Blazi. In reaching this conclusion, the judge credited Blazi's testimony that his supervisor told him that he would have received an outstanding rating except for his union activity. Despite this finding, the judge failed to make a finding with regard to the specific allegation in the complaint that this statement independently violated Sec. 8(a)(1). Because the Board has consistently found that such statements linking an employee's success on the job to involvement in union activities is a violation, we find that the statement by Blazi's supervisor violated the Act as alleged. *Armour Con-Agra*, 291 NLRB 962 (1988).

The General Counsel excepts to the judge's failure to find that certain violations found by the judge were also violations of additional sections of the Act, as alleged. We find merit in this exception. Accordingly, we find that the Respondent's denial of access to the union health and safety expert for evaluation of workplace health and safety hazards violated Sec. 8(a)(5) in addition to Sec. 8(a)(1). *Hercules, Inc*., 281 NLRB 961 (1986), enfd. 833 F.2d 426 (2d Cir. 1987). Further, we find that the Respondent's enforcement of its no-solicitation rules against union supporters to be a violation of both Sec. 8(a)(3) and of Sec. 8(a)(1). *Premier Maintenance*, 282 NLRB 10, 11 (1986). Finally, we find that the Respondent's unilateral denial of vacation benefits which was not based on any existing policy with regard to vacation benefits, violated Sec. 8(a)(5), as well as Sec. 8(a)(1) and (3). *Gulf & Western Mfg. Co*., 286 NLRB 1122, 1124–1125 (1987).

ment manager, through various levels of management, and ultimately to the Respondent's president. When bargaining began, the Union proposed the creation of an interim grievance procedure. The Respondent rejected the proposal, preferring instead to continue to use its problem-solving procedure.

Beginning with the discharge of employee Margaret Lewis in June 1988,[4] the Union attempted to have its representatives accompany employees to meetings arranged under the problem-solving procedure. Each attempt was frustrated by the Respondent's refusal to allow the union representative to accompany the affected employee or to hold a meeting with the affected employee if that employee insisted on union representation. The Union protested this action by letter, and the Respondent replied that there were ''no rights of union representation'' at these meetings and, until a collective-bargaining agreement was reached, the Respondent intended to exclude union representatives from the meetings. The Respondent indicated that it would discuss individual grievances of employees who insisted on union representation before the commencement of scheduled bargaining sessions. The Respondent, however, continued to meet individually with employees who agreed not to have a union representative present.

In January 1989, the Union established a shop steward system, and, after election of the stewards, notified the Respondent as to which employees were stewards. However, when these stewards subsequently attempted to file grievances on behalf of employees, the grievances were rejected by the Respondent. Supervisors were instructed not to meet with or accept grievances from the stewards, and they were also told that if an employee wanted to have a meeting under the problem-solving procedure, that employee could only have such a meeting without the presence of a union representative.

Under these circumstances, we find that the Respondent, in its problem-solving procedure, unlawfully excluded the Union, unlawfully denied union representation to employees, and unlawfully dealt directly with employees regarding their grievances. The undisputed evidence establishes that the Respondent excluded the Union from its problem-solving procedure and would agree to meet with the employee in an attempt to resolve his grievance only if he agreed not to have a union representative present. Those employees who gave up union representation had their grievances processed through the problem-solving procedure. Those employees who continued to insist on having a union representative present had their grievances deferred to the negotiating sessions between the parties.

The Union had a right to be present at the problem-solving meetings. In this regard, we note that the purpose of these meetings was to adjust the employment-related complaints of employees. In these circumstances, the meetings were ''grievance adjustment'' meetings, and the Union had a right to be present, without regard to whether the grieving employees desired such presence.[5]

In addition, the Respondent violated Section 8(a)(3) in these respects. Employees who agreed to forgo union representation were given a reasonably prompt face-to-face meeting with the Respondent's representatives, while those who would not agree had to await a scheduled contract negotiating session. Discussion of their grievances with the Respondent's attorney would have to be sandwiched into the time available for negotiation of a collective-bargaining agreement.[6] This discrimination in employment was violative of Section 8(a)(3). The Respondent should have met with those who sought union representation and those who did not, in both cases permitting the Union to be present.[7]

2. The General Counsel and the Charging Party excepted to the judge's failure to find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union with financial information requested by the Union in connection with the Respondent's proposal for a profit-based retirement plan. We find merit in this exception.

On September 22, 1988, the Respondent proposed a retirement plan which was to be funded by paying 2 percent of its pretax profits. The profit-based plan was offered in response to the Union's demand for a pension plan with a fixed level of contributions. On No-

[4] All dates are in 1988 unless otherwise indicated.

[5] See *Harowe Servo Controls*, 250 NLRB 958, 1049 (1980), and cases cited at fn. 250.

In Member Raudabaugh's view, the rationale set forth above establishes a violation with respect to meetings at which the Union was not present. These meetings occurred when employees agreed to forgo union representation. However, in those instances where employees insisted on union representation, no meeting occurred. Instead, the Respondent subsequently met with the Union's representative with respect to the employee's grievance. Hence, in the latter instances, there was no 8(a)(5) violation in Member Raudabaugh's view.

[6] Furthermore, the Respondent sought to use this state of affairs to denigrate the Union by observing in correspondence with employees that contract issues were going unresolved because the Union was spending too much time in negotiations discussing ''individual gripes and grievances.''

[7] Chairman Stephens and Member Devaney note that the basis for finding that the Respondent's conduct in the matter of grievance resolution violated Sec. 8(a)(3) also provides a basis for finding that the Respondent did not act in good faith in its bargaining over grievances with those employees who had to forgo problem-solving meetings because of their insistence on union representation. Thus, unlike Member Raudabaugh, they find, as noted above, that the Respondent violated Sec. 8(a)(5) with respect to these employees as well as the employees whose grievances were handled in sessions from which the Union was excluded. In so concluding, they in no way suggest that the Respondent was required to grant paid time off for the stewards or any other employees who sought to function as grievance representatives. Paid time for union representation is simply a subject on which the Respondent was required to bargain in good faith.

vember 15, after discussion at several negotiating sessions, Union Representative Hart requested documentation of the Respondent's profits since 1985. On November 27, the Respondent's attorney Wilgoren stated that the Respondent's profits for 1987 were approximately $1 million. The Union responded that it wanted more information and that it wanted it in writing. On December 15, the Respondent produced a one-page document purporting to be a ''financial summary'' for the years 1985 through 1987.

The financial summary listed for each year the Respondent's net sales and costs of sales in six broad categories, including beginning inventory, total labor, and manufacturing overhead. Those categories were deducted from the net sales figure to arrive at gross profits. The document also listed two more broad categories of deductions, ''Sell, Gen. & Admin Exp'' and ''Interest & Other Exp,'' which were subtracted from the gross profits to arrive at ''Net Profit (Loss) pretax.'' The document revealed that the Respondent had 2 years of net profits after experiencing net losses in 1985 and 1986.

At a negotiation session on January 4, 1989, the Union stated that it did not completely understand the document and asked that some of the broad categories listed be broken down. Hart told Wilgoren that he wanted to know what was included in total labor, overhead, selling and general administrative expense, and interest and other expense. Wilgoren explained that total labor included direct and indirect labor and that overhead included supervision, pollution control, and other operation costs. Finally, Wilgoren explained that ''Sell, Gen. & Admin Exp'' included the salaries of executives, personnel department employees, and sales staff. When Hart inquired as to the number of people in these categories and their salaries, Wilgoren stated that the information was not relevant. Hart replied that, as a closely held corporation, the Respondent was not required to make public disclosure and as the summary was generalized and showed large fluctuations in net profit, the Union needed to know specifically how the Company accounted for its net profits and how it derived those figures. Further, Hart stated that the Union could not responsibly judge the Respondent's pension proposal without more information. On January 26, the Union again put forward its pension proposal calling for a fixed level of contribution. Again, the Respondent, through Wilgoren, stated it would only agree to a pension plan where contributions were tied to profits.

By letter dated January 31, 1989, the Union requested a copy of the Respondent's balance sheet and funds flow statements for the last 4 years ''in order to properly evaluate'' the Company's proposal and to make a counterproposal. The letter also listed five questions related to the financial summary.[8] When the Union attempted to ask those questions at the bargaining session, Wilgoren answered the first question, but refused to give more information. The Union also proposed a counteroffer, basing pension contributions on gross profits rather than net profits. The Respondent rejected this proposal. Following this meeting, the Union, by letter dated February 8, 1989, requested answers to five additional questions concerning the ''net profit'' portion of the financial summary.[9] At the February 16 meeting, Wilgoren orally responded to the questions and for the most part stated that the information requested was irrelevant. The union representative, Carol Lambiase, then asked whether the Respondent would provide the requested information if the Union agreed to the Respondent's proposal. Wilgoren said ''no.''

The judge concluded that while, as a general matter, parties involved in collective bargaining are required to furnish relevant information to each other, the information requested by the Union here was not sufficiently relevant to require disclosure. We disagree.

It is well settled that good-faith bargaining encompasses a party's right to relevant information for use in the collective-bargaining process. *S. L. Allen & Co*., 1 NLRB 714, 727–728 (1936). Here, the Respondent proposed a pension plan linked to its net pretax profits, and the information requested by the Union was relevant and necessary to the Union's need to know what the Respondent meant by net ''pre-tax profits,'' how such a figure was derived, and whether such a figure was subject to manipulation by the Respondent. Such questions were not answered by the financial summary that the Respondent gave the Union. To the contrary, the financial summary illustrated the need for such information, given the wide fluctuations in the Respondent's net profits in the past 4 years, as well as in the categories enumerated by the Respondent from which the net profit figures were derived.

In concluding that the requested information was not relevant, the judge opined that ''the Union never entertained any serious thought of accepting the company's profit plan.'' The record indicates otherwise. At points

[8] The five questions posed by the Union were: (1) Does this statement include consolidated subsidiaries and joint ventures? (2) How much of manufacturing overhead is depreciation, and how much is real cash expenditure? (3) What is included in selling, general and administrative expense? (4) What is included in ''other'' expenses? and (5) What percentage of the total labor items is the unionized work force.

[9] The five questions were the following: (1) Regarding interest payments—who holds the loan and at what rate? (2) How much rent is paid and to whom? (3) Over how many years and what accounting method is used for depreciation? (4) How many salespersons, clericals, or other administrative positions are there, how many managers are there, and what are their salaries? and (5) Please list each item in selling, general, and administrative expense and ''other'' expenses and the amount of money for each one.

in the negotiations, the Union, in fact, offered to accept a profit-based pension plan based on gross profits, and the union representatives, Lambiase and Hart, asked whether the Respondent would provide the requested information if the Union agreed to the Respondent's proposal. The judge conceded that, if the Union had accepted the Respondent's proposal, the Respondent would have been obligated to furnish the requested information. Given the proposition that the information would be relevant once the proposal is accepted, it is difficult to escape the conclusion that it is relevant to the Union's evaluation of the proposal before acceptance. We find no logical or legal basis for requiring a party to accept a proposal before being given a chance to review information that is relevant and necessary to its evaluation.

Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) by refusing to furnish the Union with financial information it requested in connection with the Respondent's proposal for a profit-based retirement plan.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Circuit Wise, Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(d).

''(d) Refusing to furnish to the Union information about average lots and yield for fiscal year 1989 and customer returns which information is relevant to the Company's proposed Quality Bonus Plan.''

2. Insert the following as paragraphs 1(n), (o), and (p) and reletter the subsequent paragraph accordingly.

''(n) Excluding the Union from the Company's problem-solving procedure and dealing directly with employees regarding their grievances.

''(o) Denying union representation to employees in its problem-solving procedure.

''(p) Failing to furnish to the Union information requested by it in its letters dated January 30, 1989, and February 8, 1989, regarding the Respondent's proposal for a profit-based retirement plan.''

3. Substitute the following for paragraphs 2(h) and (i).

''(h) On request, furnish to the Union the information found to be unlawfully withheld.

''(i) Make whole, with interest, any employees who as a result of the change in work schedules in June 1989, lost overtime pay and for whom recognition was unlawfully withdrawn.''

4. Insert the following as paragraph 2(m) and reletter the subsequent paragraphs accordingly.

''(m) On request of the Union, set aside the grievances which were unilaterally adjusted by the Respondent in its problem-solving procedure.''

5. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT prevent a union-designated employee from speaking with or questioning other employees during safety inspection tours conducted by the Occupational, Safety and Health Administration (OSHA).

WE WILL NOT refuse to allow a union-designated expert visit the plant for the purpose of making a safety inspection.

WE WILL NOT fail to timely furnish to the Union the following information after the strike commenced;

> (1) Rates of pay, job classifications and dates of hire of replacement employees.
>
> (2) Rates of pay and classifications of all employees permanently transferred into bargaining unit jobs.
>
> (3) Names of any bargaining unit employees terminated since 8/30/89 and the reasons therefore.

WE WILL NOT refuse to furnish to the Union information about average lots and yield for fiscal 1989 and customer returns which information is relevant to the Company's proposed Quality Bonus Plan.

WE WILL NOT withdraw recognition from a portion of the bargaining unit encompassing waste water treatment technicians.

WE WILL NOT unilaterally increase employee contributions for health insurance benefits.

WE WILL NOT unilaterally change work schedules of our employees.

WE WILL NOT enforce a no-solicitation rule disparately and discriminatorily against employees who engage in union solicitations and activities.

WE WILL NOT discharge employees, issue warnings, suspensions, or other disciplinary actions to employees because of their union or protected concerted activities.

WE WILL NOT refuse to give employees deserved job evaluation ratings and concomitant merit raises because of their union or protected concerted activities.

WE WILL NOT notify employees that their absences are not excused in circumstances where we have been given advance notice that such employees will be attending union meetings and in the absence of a demonstrated need for such employees to be at work.

WE WILL NOT fail to pay accrued vacation benefits to employees because they are engaged in a strike.

WE WILL NOT exclude the Union from our problem-solving procedure and deal directly with employees with regard to their grievances.

WE WILL NOT deny union representation to employees under our problem-solving procedure.

WE WILL NOT refuse to furnish to the Union information requested to evaluate the Company's proposed pension plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time production and maintenance employees employed by the employer at its North Haven Connecticut facility including employees involved in the production of products for Mint-Technologies, Inc., chemical technicians and waste water treatment technicians; but excluding all other employees, lead persons, office clerical employees and guard, professional employees and other supervisors as defined in the Act.

WE WILL offer immediate and full reinstatement to Margaret Lewis and Lennora Daniels to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL rescind the 3-day suspensions of Lonnie Hailey and Rose Puccino and make them whole, with interest, for any loss of earnings or other benefits they may have suffered.

WE WILL remove from our files any references to the unlawful discharges, suspensions, and warnings respectively given to Margaret Lewis, Lennora Daniels, Lonnie Hailey, Rose Puccino, Frank Blazi Jr., and Javier Cruz, and notify these employees, in writing, that this has been done and that the disciplinary actions will not be used against them in any way.

WE WILL change our records regarding Joseph Wingate to reflect that his absence on February 24, 1989, was excused.

WE WILL change the May 1989 evaluation of Frank Blazi Jr., to outstanding and make him whole, with interest, for any loss of earnings or benefits that he suffered.

WE WILL, on request, meet with the Union to decide on reasonable times and places when the Union can have its designated health and safety expert visit and inspect the plant.

WE WILL, on request, furnish to the Union, the information found to have been unlawfully withheld.

WE WILL make whole, with interest, any employees who, as a result of the change in work schedules in June 1989, lost overtime pay and for whom recognition was unlawfully withdrawn.

WE WILL reimburse all employees, with interest, from March 1, 1989, for the increased contributions deducted from their pay for medical benefits. In the event that the Union wishes to revoke the May 1989 interim agreement, we will reimburse the employees for their share of the increased medical coverage contributions from March 1, 1989, until such time as a new interim agreement regarding medical benefits is reached, or until a final collective-bargaining agreement is reached, or until we bargain in good faith until impasse about medical coverage, whichever comes first.

WE WILL offer to the strikers on application, reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or any other rights and privileges, and dismiss if necessary any strike replacements hired after the strike commenced on September 11, 1989.

WE WILL, on request of the Union, set aside any grievance which was unilaterally adjusted in our problem-solving procedure.

CIRCUIT-WISE, INC.

Michael A. Marcionese, Esq. and *Thomas Quigley, Esq.*, for the General Counsel.
Howard I. Wilgoren, Esq., for the Respondent.
Jamie L. Mills, Esq. (Rosenblatt & Mills), for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Hartford, Connecticut, on various days from April 30, 1990, to August 1, 1990. The charges were filed at various times during the period from June 20, 1988, through March 6, 1990. Based on these charges a variety of complaints were issued by the Regional Director of Region

34 from August 19, l988, to April 17, 1990. All of the allegations involved in these consolidated proceedings may be found in the third amended consolidated complaint which was issued on March 27, 1990, the complaint which was issued on April 17, 1990, and pursuant to a motion to amend that was presented at the opening of the hearing. In substance, the allegations are as follows:

1. That on or about April 21, l988, Respondent distributed a coupon booklet to employees before an election which had the effect of threatening layoffs and a plant shutdown if the employees selected the Union.

2. That on June 15, 1988, Respondent discharged Margaret Lewis and thereafter refused to allow her to participate in its problem-solving procedure because of her union activity.

3. That since June 16, l988, Respondent has refused to allow union representatives to be present at meetings between management and employees held under the Respondent's problem-solving procedure and has thereby bypassed the Union when dealing with employees regarding their grievances.

4. That since June 16, l988, Respondent has refused to meet with designated shop stewards of the Union for the purpose of resolving grievances.

5. That on or about January 31, 1989, the Respondent withdrew recognition and refused to bargain with the Union regarding a portion of the bargaining unit classified as maintenance service operators and waste water treatment technicians.

6. That on or about January 31, l989, the Respondent unilaterally reassigned work from the maintenance service operators to waste water treatment technicians.

7. That on or about February 17, 1989, Respondent by Thomas McMahon and Shelly Albino engaged in surveillance of union and concerted activity.

8. That on or about February 20, 1989, Respondent by Ken Borkowski[1] disparaged the Union.

9. That on or about February 23, l989, Respondent suspended Jesus Agosto because of his union activities.

10. That on or about February 24, 1989, Respondent by Merle Ames prevented union representatives from talking to employees.

11. That on February 27, l989, Respondent discharged Jesus Agosto because of his union activities.

12. That on February 27, l989, Respondent issued a verbal warning to Frank Blaze for violating an unlawful rule prohibiting employees from discussing union matters on company time.

13. That on February 27, 1989, Respondent issued warnings to Frank Blazi and Javiar Cruz because of their union activities.

14. That on February 27, l989, Respondent charged an unexcused absence to Joseph Wingate because of his union activities.

15. That on February 28, l989, Respondent issued a warning to Lonnie Hailey because of his union activities.

16. That on or about March 1, 1989, the Respondent unilaterally implemented an increase in employee contributions to Blue Cross.

17. That on April 24, l989, Respondent discharged Lenora Daniels because of her union activities.

18. That on May 3, l989, Respondent issued a warning to Lonnie Hailey because of his union activities.

19. That on May 5, l989, Respondent discharged Jeremiah Samuel, Jr, because of his union activities.

20. That on May 5, l989, Respondent suspended Rose Puccino because of her union activities.

21. That on May 11, l989, the Respondent unilaterally implemented a procedure for laying off and/or transferring employees from a related company called Mint-Pac Technologies.

22. That on May 11, 1989, Respondent laid off Rose Puccino from Mint-Pac and offered her another more onerous job at Circuit-Wise because of her union activities.

23. That the actions of Respondent described above in paragraph 22 amounted to a constructive discharge of Puccino.

24. That on May 11, 1989, Respondent laid off Lonnie Hailey from Mint-Pac and offered him a more onerous job at Circuit-Wise because of his union activities.

25. That on May 25, 1989, Respondent refused to give Frank Blazi an outstanding job rating because of his union activities.

26. That on or about June 6, l989, Respondent told employees that they would receive higher job ratings if they did not engage in union activities.

27. That Respondent has at all material times refused to provide certain information (described below) which was relevant for bargaining.

28. That on September 6, 1989, the Respondent has unlawfully denied access to a union agent for the purpose of inspecting its facility for health and safety.

29. That a strike which commenced on September 11, l989, was an unfair labor practice strike.

30. That Respondent withheld accrued vacation benefits to the strikers.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FINDINGS AND CONCLUSIONS

A. *Preelection Conduct*

The Union's organizing drive began in the autumn of 1987 and a petition was filed leading up to an election on May 13, 1988. Pursuant to a Decision and Direction of Election dated April 14, l988, the bargaining unit was defined as including:

[1] This person changed his name to Ken Burke. I have used his original name in this decision only because that is the way that most of the witnesses referred to him.

[2] I grant the General Counsel's unopposed motion to correct the transcript, a copy of which is attached hereto as Appendix A (omitted from publication).

> All full time and regular part time production and maintenance employees employed by the employer at its North Haven Connecticut facility including employees involved in the production of products for Mint-Technologies, Inc., and chemical technicians; but excluding all other employees, lead person, office clerical employees and guard, professional employees and other supervisors as defined in the Act.

During the preelection period the Company issued to employees a piece of propaganda consisting of a coupon booklet which among other things said:

> To protect yourself against wild promises by paid union organizers, make them sign each promise!
>
> I Guarantee: there will be no lay-offs regardless of whether or not your company has work to do; and my union will not sign a contract permitting your company to lay off or terminate employees. If they do, the union will be liable.
>
> I Guarantee: my union will pay for the support of your family and all of their expenses if you are thrown out ofwork because of union strikes or plant shutdown.

As noted above, the General Counsel contends that the above constitutes an unlawful threat of layoffs and plant shutdown if the Union were to be selected by the employees. I do not agree. At most the assertions merely express the opinion that no union can guarantee that people will not be laid off or that plant shutdowns may not occur in the future. Consequently I do not view these statements as constituting threats, particularly in light of the fact that no other contemporaneous unfair labor practices were alleged or shown. See *Leyendecker Paving,* 247 NLRB 28, 36 (1980), where the Board dismissed an 8(a)(1) allegation on facts substantially similar to those described above.

B. *Overview*

Notwithstanding the above, the Union obtained a majority of the votes and it was certified as the exclusive collective-bargaining representative on May 31, l988. Negotiations commenced on June 9, l988.

In all, there were more than 30 bargaining sessions from June 9, l988, until August 1, l989, when after having made a final offer, the Respondent declared an impasse.

During the negotiations the Union's chief spokespersons were Union Representatives Al Hart and Carol Lambiase in his absence. The chief spokesman for the Company was Attorney Howard Wilgoren.

On September 11, l989, the Union commenced a strike which was still in progress during the hearings. Thus, no strikers have made unconditional offers to return to work.

C. *Allegations Relating to Grievance Handling Procedures*

For some time prior to the arrival of the Union, the Company maintained a problem-solving procedure. Pursuant to this procedure, an employee with a complaint (typically concerning disciplinary action), could bring his ''grievance'' through a series of steps from the department manager, to the personnel manager, to the vice president of manufacturing, and ultimately to the president of the Company.

When bargaining began, the Union proposed that there be created an interim grievance procedure until a contract was reached. This was rejected by Respondent which indicated that it already had its own problem-solving procedure. At no time did the Union insist that the Company cease using its problem procedure. Rather, as set forth below, it was the Union's position that the Company was obligated to allow union appointed representatives be present when the Company's problem-solving procedure was utilized by employees. (The evidence indicates that the Company bargained in good faith regarding the subject of a grievance procedure to be included in a contract if such a contract was reached.)

Commencing with the discharge of Margaret Lewis, in June 1988, the Union on various occasions sought have its representatives accompany employees to meetings set up in relation to the problem-solving procedure. On all such occasions the Employer refused to allow union representatives to accompany the affected employee and refused to hold a meeting with the employee if he or she insisted on having the Union present.

On June 16, l988, Union Agent Hart sent a letter to McMahon stating:

> [T]he Union is protesting your refusal to allow me to represent Margaret Lewis in a meeting with Manager Bill Abbate regarding her discharge. It is the Union's contention that employees have a right to such representation, and we reiterate our request that the company meet with Ms. Lewis and a Union representative to discuss her discharge.

On June 16, l988, Wilgoren responded:

> Margaret Lewis was discharged in accordance with existing Company rules for disseminating false and derogatory rumors concerning co-workers.
>
> Ms. Lewis did not have the right to insist on your presence at a meeting she requested with her former department manager. The meeting was scheduled at Ms. Lewis' request in accordance with the Company's Problem Solving procedure. The purpose of this meeting was not investigatory, and there were accordingly no rights of union representation. Similarly, the union's status as . . . bargaining representative does not in and of itself give you the right to be present at any meeting requested by an employee.
>
> I am certain that once we have a collective bargaining agreement it will provide for a complete grievance procedure that will include union representation at the various steps. Until that time, the Company will continue to follow its existing Problem Solving Procedure.

In relation to the discharge of another employee in August 1988, the Union again attempted without success to have a union representative accompany the employee to a meeting under the problem-solving procedure. In a letter dated August 29, 1988, after advising of the reasons for the employee's discharge and responding to certain requests for information, Wilgoren advised union agent Carol Lambiase inter alia, that:

> This letter will confirm our telephone discussion of August 23, 1988 with respect to the termination of

> Mary Silver . . . . As you well know, I have been designated by the Company as its collective bargaining representative. Accordingly, it is appropriate for you to direct all requests for information or other matters to me. I would appreciate if you would do so in the future. As we discussed, Ms. Silver was terminated . . . .
>
> You also asked whether the Union could be present at the Company's Problem Solving Procedure. I am not aware that Ms. Silver requested any such meeting. In any event, the Company intends to continue to exclude any non employees from the Problem Solving Procedure as it has consistently done in the past. Once we complete negotiations for our contract, I am sure that it will contain an effective grievance procedure which will include involvement by Union representatives. indeed, the Company has made such a proposal. However, until we conclude a contract, the company intends to maintain the status quo in this regard.

Subsequently while the Union continued to press the Company to allow its representatives to be present during the problem-solving procedure, the Company has consistently refused and has indicated that it was willing to discuss individual grievances through its attorney before the commencement of scheduled bargaining sessions.

In January l989 the Union decided to establish a shop steward system to handle grievances. Accordingly, stewards were elected and the Company was notified on January 31, 1989, as to who those stewards were. At the same time the Union prepared union grievance forms to be used by its stewards. When those shop stewards thereafter attempted to file grievances, they were rejected by the employer. Supervisors were instructed by the Company not to meet with or accept grievances from the the designated union stewards and that if an employee wanted to have a meeting under the problem-solving procedure, he or she could only have such a meeting without the presence of a union representative. In short, the Company refused to accept the Union's attempt to impose unilaterally, a grievance procedure in which supervisors would have to deal with shop stewards. Instead, the Company insisted that all employee grievances be dealt with through its Attorney Howard Wilgoren.

From the above the General Counsel posits that the Respondent violated Section 8(a)(5) by:

1. Refusing to allow stewards and other designated union representatives to represent employees.

2. Refusing to allow union representatives to be present during meetings with employees during meetings with employees in the employer's problem-solving procedure.

3. Dealing directly with employees regarding individual grievances.

When a union has been designated as the employees' exclusive bargaining representative, the employer must deal directly and exclusively with the union regarding wages, hours, and other terms and conditions of employment. It therefore may not deal directly with its own employees regarding such subjects. In *Medo Photo Supply Corp v. NLRB*, 321 U.S. 678 (1944), Court stated:

> Petitioner, by ignoring the union as the employees' exclusive bargaining representative, by negotiating with its employees concerning wages at a time when wage negotiations with the union were pending, and by inducing its employees to abandon the union by promising them higher wages violated Section 8(a)(1) of the Act . . . .
>
> That it is a violation of the essential principle of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to wages hours and working conditions was recognized by this Court in *J.I. Case Co. v. Labor Board*.

Nevertheless, by statute a limited exception is made for individual grievances. Section 9 of the Act states inter alia;

> Representatives designated . . . for the purposes of collective bargaining . . . shall be the exclusive representatives of all the employees in such unit . . . *Provided*, That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

In the present case, the Employer had a preexisting procedure whereby employees who received discipline could appeal those actions. Once its bargaining status was established, the Union did not ask that this procedure be eliminated. Instead the Union unsuccessfully sought to get the Employer to agree to modify it.

There clearly would have been a violation of the Act had the Employer continued to insist on settling individual grievances without giving the Union an opportunity to be present. That however was not the facts in this case. On the contrary, when an employee or the union insisted on union representation during the problem-solving procedure, the Employer ceased meeting with the employee and thereby ceased any ''direct dealing.'' Cf. *Kaiser Foundation Health Plan*, 269 NLRB 741 (1984).

As a corollary to the obligation to bargain, each side, except in extraordinary circumstances, can designate the individuals it wishes to represent them. Correspondingly, neither side can force the other to designate certain individuals to represent it. *Frankline, Inc.*, 287 NLRB 263 (1987).

Whatever the merits of the Union's proposed interim grievance procedure, I do not think that the Act requires the Employer to consent to such a procedure pending the finalization of a collective-bargaining agreement. While an employer is required by law to bargain about and deal with the Union in relation to employee grievances, it seems clear that the law does not require the employer to agree to any particularized procedure for accomplishing that result. It is sufficient under Section 8(a)(5) for the Employer to be willing to bargain in good faith at reasonable times and places. By the same token, I don't see how the Union can compel the employer to select who will deal with grievances on the em-

ployer's behalf.[3] Yet by its actions in January 1989, this is precisely what the Union attempted to do. When it selected shop stewards and gave them instructions as to how and to whom to present grievances, those actions if acceded to, would have required the Company to select its bargaining representatives in accordance with the Union's desires.

It may be that the Company's selection of its attorney to bargain about grievances placed a burden on the process of negotiating a contract. It may also be that by dealing with grievances in this fashion, an argument might have been made (depending upon the number and extent of pending grievances), that the Employer failed to meet at reasonable times and places. Nevertheless, the Union did not make such an argument and it is my opinion that if the Company chose Wilgoren as its representative in dealing with grievances, the Union was required to deal with him on this subject and could not force the employer to select supervisors or anyone else to be company representatives. That is, although the Company would be required to deal with the Union's designated shop stewards, it can choose to do so through its attorney and not through its regular supervisory staff. As the evidence shows that the Company through its attorney did deal with grievances, and as there was insufficient evidence to establish that he did not meet at reasonable times and places, I do not think that the evidence is sufficient to establish in these circumstances that the Employer refused to bargain with the Union about grievances.[4]

D. *Allegations Relating to Health and Safety*

In the process of making circuit boards, copper and other metals are released in the water. Also, the process involves the use of a number of toxic chemicals. In this regard, company representative Michelle Albino testified that about 70 percent of the employees come into proximity with dangerous chemicals on a daily basis.

Pursuant to a union complaint, representatives of the Occupational Safety and Health Administration (OSHA) visited the plant from February 17 to February 20, 1989. This inspection was principally in relation to an explosion that had occurred in the HASL department. In accordance with Federal Regulations, an employee is entitled to accompany the inspection and where a union represents the employees, the inspector usually has a union-designated employee accompany him or her during the inspection.

Janet O'Donnell was one of the OSHA inspectors who visited the plant in February 1989. Prior to her visit she was not informed as to which employee the Union wished to have designated to accompany her on the inspection. Therefore, according to O'Donnell, when she arrived at the plant on February 17 and asked if there was a union or union representative who could accompany her, she was told that although the Company and the Union were in the middle of bargaining the Company did not recognize the Union. She further testified that she was told that the Union had selected stewards but that the Company did not recognize them because there was no contract and no grievance procedure had been agreed to.

In any event, on or about February 18, the Union notified the Company that employee Lonnie Hailey was designated as its safety representative. When the OSHA representative was similarly notified, the OSHA inspectors, accompanied by Hailey, walked around the plant and interviewed employees in various departments on February 19 and 20.

In relation to the above, the General Counsel alleges that the Respondent committed an independent 8(a)(5) violation by telling the OSHA representative that it didn't recognize the Union. I don't agree. Although I do not dispute O'Donnell's veracity, I think that she has confused two separate concepts and did not quite understand the notification that she was given by the Company. Clearly, the Company in acknowledging that the Union had won an election and that there was bargaining in progress, did not intend to convey the message that it did not recognize the Union as the employees' representative. At most, it is my opinion that O'Donnell was told that the Company did not recognize the Union's shop stewards in the absence of an agreed-upon grievance procedure and that the Company had not been advised by the Union (which had filed the OSHA complaint), as to which employees it wished to designate as its safety representatives.

In relation to this inspection, the General Counsel contends that the Company by McMahon and Albino engaged in surveillance of interviews being conducted by the OSHA inspectors and that the Company interfered with Section 7 rights by telling Hailey that he could not talk to employees during the OSHA interviews.

There was evidence that an interview with an employee was conducted by the OSHA representatives and Hailey in a glass-enclosed supervisor's office on the production floor. Company Representatives McMahon and Albino who also went along on the tour were, however, not allowed by the Government agent to participate in the interview. They therefore remained outside the office, albeit able to see into the office because of the window. At one point, according to O'Donnell, Hailey indicated to her that the company representatives were looking into the room. Further she states that after the interview, McMahon said that he saw Hailey moving his lips, indicating his displeasure that Hailey was allowed to participate actively in the interview.

Assuming that McMahon and Albino on one occasion looked into the room during an interview, I do not think that this is sufficient evidence of unlawful surveillance under the Act. The interview took place on company property in a room which, because enclosed by glass, was visible from the outside. No one told the Company's officials either before or during the interview to leave the area, and there is no evidence that they would not have complied had such a suggestion been made. In these circumstances, I therefore conclude that this allegation lacks merit. See *Porta Systems Corp.*, 238 NLRB 193 (1978).

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[3] Sec. 8(b)(1)(B) of the Act makes it an unfair practice for a union to restrain or coerce ''an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.''

[4] If the Company chooses to have its attorney handle all grievances at all levels, then I think it must make him available with sufficient promptness and frequency to deal with individual grievances as they arise. Also, as it is my opinion that the Union would have the right to select certain employees as its representatives for grievance-handling functions, it may be that the obligation to meet at reasonable times and places might entail, in some instances, having such discussions in the plant during regular working hours. Of course, as the issue was not framed this way, these comments should be construed as dicta.

On the other hand, the credible evidence shows that during this February inspection tour when Hailey attempted to ask another employee in the HASL department a question, Supervisor Merle Ames shouted. ''You're not going to say anything to anyone over here, and if you do, you're going to get out of here.'' As the inspection tour dealt with safety questions, it clearly involved terms and conditions of employment. Moreover, as Hailey had been designated by the Union to be its representative during the OSHA inspection tour, the attempt by Ames to prohibit Hailey from talking to other employees during the tour constituted, in my opinion, interference with rights protected by Section 7 of the Act. As such I conclude that Respondent by this conduct violated Section 8(a)(1) of the Act.

As noted above, the processes by which the Company makes its products are probably inherently dangerous. That is the creation of these circuit boards requires the use caustic and toxic chemicals. Moreover, in the past there have been a number of instances where chemical spills have occurred which had the potentiality of peril. From time to time, inspections have been made by OSHA and in addition to the one described above, another inspection was made in July l989.

The Union employs a person named Billy Holden as its health and safety specialist. In July l989 at a bargaining session, the Union asked that Holden be allowed to accompany the OSHA inspectors during a tour of the plant. This request was made as it was believed that Holden had a degree of expertise that employees could not match. The Company rejected this idea, insisting that the only persons it was required to allow accompany the OSHA officials were persons employed by the Company.

On August 25, 1989, Carol Lambiase wrote to Company Representative David Schumacher as follows:

> I am requesting that you grant access to Field Organizer Billy Holden, the Union's health and safety specialist, into Circuit-Wise to observe and survey health and safety hazards at the plant.
>
> Numerous investigations by OSHA have shown that there are many serious violations of the law which jeopardize the health of the workers. Spills of toxic chemicals are commonplace, potentially fatal accidents occur with regularity, and chronic exposure to neurotoxic, carcingenic, and ergonomic hazards abound. We believe that it is within the employees' representational rights as determined by the NLRB to allow the Union to ascertain the extent of potential hazards within the plant. We further believe that such an inspection by Dr. Holden would occasion little if any interference or disruption of the production process. As evidenced by OSHA, the health and safety provisions at Circuit-Wise are clearly inadequate to safeguard against many of the hazards present.
>
> Dr. Holden, a Columbia and Yale trained occupational epidemiologist, has the necessary expertise to conduct such a survey. Due to the nature of the industry—the solvents and other toxic chemicals used therein and the hazardous working conditions—an opportunity for the Union to observe the health hazards is considered by us to be warranted. Again, such an opportunity would cause no undue hardship or inconvenience to the Company.
>
> We would like to schedule the survey to begin on Thursday, September 31, 1989.

On September 6, 1989, Howard I. Wilgoren responded as follows:

> That letter [to Mr. Schumacher dated August 25, 1989], is replete with falsehoods and other statements wholly unsupported by ascertainable fact. Accordingly, your request is denied. If you have any concrete basis for the spurious and unsubstantiated allegations contained in your letter of August 25, 1989, please forward same to the undersigned. Otherwise, you are strongly advised to refrain from making such irresponsible and undocumented charges in the future.

In my opinion, *Hercules, Inc.*, 281 NLRB 961 (1986), enfd. 833 F.2d 426 (2d Cir. 1987), is dispositive of this issue and compels the conclusion that the employer violated the Act in this regard. In that case, the Union asked to have an expert visit the plant to make an inspection after the occurrence of an explosion. The Company refused and similar to the present case asserted among other things that OSHA had inspected the plant and that such an inspection was sufficient. Unlike the facts of the instant case, Hercules asserted that such an inspection would compromise secret manufacturing processes. The court, in enforcing the Board's Order stated:

> When the union requests not only information but also access to the employer's property in order to obtain health and safety information, the Board balances the employee's right to information against the employer's property rights. *Holyoke Water Power Co.*, 273 NLRB 1369 enfd. sub nom. *NLRB v. Holyoke Water Power Co.*, 778 F.2d 49 (1st Cir. l985) cert. denied 106 S.Ct. 3274 (1986).
>
> An employer's property rights must yield when ''responsible representation of employees can be achieved only by the union's having access to the employer's premises.''
>
> In *Holyoke*, the Board amended [*Winona Industries*], 257 NLRB [695], and adopted in its place the current balancing test, which was originally formulated in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (l956). When union organizational rights were at issue, Babcock & Wilcox employed a balancing test to resolve union access to company property. But the unanswered question is whether—when union representational rights are at issue—the *Babcock & Wilcox* rationale applies in the Section 8(a)(5) context. The fact that a bargaining relationship already exists makes union access considerably less intrusive on an employer's property rights, and thus arguably justifies the application of the more lenient Winona standard in determining whether to grant access . . . .
>
> Unlike the cases above, the Company in the instant case raises a property interest encompassing more than just the bare right to exclude people from its premises. Rather the Union's request for access threatens Hercules' significant property interest in its secret manufac-

turing processes and . . . it is therefore appropriate to employ the *Babcock & Wilcox* balancing test.

Hercules makes several arguments which it claims tip the scales in its favor . . . . First, it points to its proprietary interest in highly confidential . . . production techniques . . . . The Board's order similarly was conditioned on the Union's signing a trade secret agreement. We believe this condition adequately protects the Company's proprietary interest.

Second, the Company argues that there were effective alternatives to direct physical access . . . . Requiring total reliance on Company data would in effect place the Union at the mercy of the Company . . . . Such total reliance would be even more disagreeable in the present circumstances, where the explosions raised safety questions implicating not only the employees' health but their lives as well.

Third, Hercules questions the qualifications and competence of the Union's industrial hygienist. Although the hygienist admitted that he had little experience investigating explosions or testing and analyzing the chemical compounds involved . . . his testimony . . . leads to a reasonable inference that he was capable of investigating the matter.

Fourth, the Company points to the disruption in its operations that access would cause. Again, the Board's Order allays this concern. The limitation that access be allowed only for reasonable periods and at reasonable times permits Hercules to negotiate in order to ameliorate any inconvenience it might experience.

E. *Refusal to Furnish Information Allegations*

Although the evidence shows that during the negotiations there was a great deal of information that passed between the Union and the Employer, there are several discreet areas where it is alleged that the Union requested information that the Company refused to furnish. All of these involve somewhat unusual issues.

1. Request for profit/loss information

On September 22, 1988, the Company proposed a retirement plan which was to be funded by paying 2 percent of pretax profits. This was in response to the Union's demand for a pension plan calling for the Company to pay a fixed and determined amount to a fund.

Regarding the differing approaches to this issue, the evidence indicates that the Union never seriously considered accepting the Company's proposal because if adopted, it would have meant that payments under the plan would be completely indeterminate from year to year and there would be no guarantee that any payments would be made. As Union Agent Lambiase correctly observed, the Company's pension proposal was ''like a game of chance.''

On November 15, 1988, Union Representative Hart requested that the Company produce documentation regarding its profits since 1985. On November 27, Wilgoren stated that in l987 the Company's profits were about $1 million. The Union responded that the information given was insufficient and that it wanted the information in writing.

On December 15, 1988, the Company handed over to the Union a document purporting to be a financial summary for the years 1985 through 1988. This read:

	FY 1988	*FY 1987*	*FY 1986*	*FY 1985*
Net Sales	$33,529	$$26,328	$19,650	$36,574
Cost of Sales				
Beg Inventory	1,512	1,218	1,624	3,711
Purch Material	10,857	8,261	5,446	11,007
Total labor	6,802	4,513	3,690	6,498
Mfg. Overhead	10,103	8,590	7,168	11,614
Outside Vendor	63	390	252	630
Less End Inv.	(2,080)	(1,512)	(1,218)	(1,624)
Cost of Sales	27,257	21,460	16,962	31,836
Gross Profit	$6,272	$4,868	$2,688	$4,738
Sell, Gen. & Admin. Exp.	3,129	3,884	2,792	4,854
Interest & Other Expenses	774	351	649	1,253
Total Other Ex.	4,903	4,235	3,441	6,107
Net Profit Pre Tax	$1,369	$633	($753)	($1,369)

At a negotiation session held on January 4, 1989, the Union's representatives stated that they did not completely understand the document; asking what was included in total labor, overhead, selling, interest, other expenses, and general and administrative expenses. Wilgoren responded that total labor included inter alia supervision; and that the category sell, gen. & admin. exp. included salaries of executives, salespeople, and personnel employees. When Hart then demanded to know what the salaries were of the sales people, the owners and the executives, Wilgoren replied that such information was not relevant. Hart then stated that as the Company was a closed corporation not required to make public disclosure, and as the Company's summary was generalized and showed large fluctuations in net profits and losses from year to year, the Union needed to know specifically how the Company accounted for its net profits and how it derived those figures. Hart stated that the Union could not responsibly judge the Company's pension proposal without more information and expressed the fear that the Company could hide profits. Wilgoren responded that information setting forth the salaries of the owners and nonunit personnel was none of the Union's business.

At the negotiation session held on January 26, 1989, the Union again put forward its pension proposal calling for a fixed level of contributions. Wilgoren on behalf of the Company stated that it would not agree to such a plan and that the Company would only agree to a pension plan where contributions were tied to profits.

On January 30, 1989, Carol Lambiase sent a letter to the Company reading:

> In order to properly evaluate the Company's profit sharing pension proposal, and enable the union to make a serious counter-proposal, the union needs a copy of the balance sheet and the funds flow statement for the last four years. Without these, the income statement is of little use, and is subject to distortions based on accounting conventions that make interpretation a guessing game.

In addition, in order to properly interpret the income statement previously supplied, the following questions have arisen:

> 1) Does this statement include consolidated subsidiaries and joint ventures?
> 2) How much of manufacturing overhead is depreciation, and how much is real cash expense?
> 3) What is included in selling, general and administrative expense?
> 4) What is included in ''other'' expenses?
> 5) What percentage of the the Total labor items is the unionized work force?

The Union's letter of January 30 was thereafter followed up by an additional letter dated February 8, 1989, calling for additional information. This read:

> Because your pension proposal is based on ''net'' profit, we need the following information, plus the clarifications listed in our previous letter or January 30, l989 . . . .
> 1) Regarding interest payments-who holds the loan and at what rate?
> 2) How much rent is paid and to whom?
> 3) Over how many years and what accounting method is used for depreciation?
> 4) How many sales-persons, clericals or other administrative positions are there, how many managers are there, and what are their salaries?
> 5) Please list each item included in selling, general and administrative expense and ''other'' expenses and the amount of money for each one.
> To avoid any confusion of the matter we would appreciate a *written* response.

At a meeting on February 16, Wilgoren made an oral response to the two union letters. He stated the requests insofar as they called for information regarding loans and rents were irrelevant. As to depreciation he stated that this was done in accordance with generally accepted accounting principles. Wilgoren stated that information regarding the salaries of nonunit employees was irrelevant and that having set forth what the Company meant by selling, general, administrative, and other expenses, he was not going to give any more information on that subject. Wilgoren further stated that the financial information originally given did not include the operations of Mint-Pac Technologies or Multi-Layer Products Group, these being two affiliated companies to the Respondent. He also stated that the other questions in the January 30 letter were not relevant. As a general matter, the parties involved in collective bargaining are required to furnish relevant information to each other. This is to aid the bargaining process and ease the procedure by which agreements are reached. However, it has been held that financial information regarding profits and losses are not disclosable unless a Company pleads inability to pay. *NLRB v. Truit Mfg. Co.*, 351 U.S. 149 (1956).[5] Similarly, a company generally has no obligation to furnish information regarding the wages and salaries of nonbargaining unit employees, unless specific relevancy where for example supervisors are shown to perform substantial amounts of bargaining unit work. *Northwest Publications*, 211 NLRB 464, 465 (1974); *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

In my opinion the financial information requested is not sufficiently relevant as to require disclosure. The Union quite rightly characterized the Company's pension proposal as being one without guarantees. Thus, under the Company's proposal, if there were no net profits in any given year, then no contributions would be made for pensions. The key factor, from the Union's point of view would be whether they could reasonably anticipate that the Company would have future profits and be in a reasonable position to guess the level of such profits. But to that end, the Company's actual past profits or losses are, and could not serve as a guide as to whether, and to what extent, the Company would have future profits.

I shall assume that the Union had reason to be worried about the Company being able to manipulate profit figures when the time came to put up money. Given that assumption there nevertheless would be nothing to prevent the parties from bargaining and agreeing on a method by which future profits would be defined for purposes of pension contributions. For example, if the Union was worried that the Company could deduct rents paid to the owners, the Union could argue that this item should not be counted when defining net profits. If the Union was concerned about depreciation, it could bargain to select one of the various methods by which depreciation is accounted for. In short, the past methods and procedures by which the Company had determined its net profits would not prevent or even inhibit the parties from bargaining over the definition of profits insofar as that term would be used for pension purposes.

Finally, it is my opinion that the Union never entertained any serious thought of accepting the Company's profit plan. As such, I do not think that the information was really relevant to the Union's bargaining strategy. I am inclined to suspect that the Union's real purpose in demanding the financial information was not to evaluate the Company's proposal, but rather to exercise tactical pressure to get the Company to accept the Union's concept for a fixed rate pension plan.[6]

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[5] See also *E. W. Buschman Co. v. NLRB*, 820 F.2d 206 (6th Cir. 1987); *Steelworkers Local 5571 v. NLRB*, 401 F.2d 434, 436 (D.C. Cir. 1968); *Clemson Bros.*, 290 NLRB 944 (1988); *American Model & Pattern*, 277 NLRB 176 (1985); *Advertisers Mfg. Co.*, 275 NLRB 100 (1985); *Havestone Mfg. Corp.*, 272 NLRB 939 (1984).

[6] My opinion would be completely different had the Union actually agreed to a pension plan where contributions were based on profits. In such a circumstance, and for purposes of enforcing such a contract, the Union would clearly be entitled to detailed financial information because the issue then would be the extent to which the Company had profits upon which contributions would be due and owing. Moreover, in such a circumstance, I think that the Union would be entitled to have its own accountants examine the Company's original books and records.

2. Request for medical information

Frank Blazi was one of the employees on the Union's negotiating team and was designated by the Union as a shop steward. He testified that on May 4, 1989, he heard that a ventilation problem had arisen in the PTH area and that an employee had become sick. Blazi states that on May 5 or 6 he went to the office of John Bartalotta, the vice president of manufacturing, and asked if Paul LaFontaine had indicated to them that he had suffered due to chemical exposure. According to Blazi, Bartalotta said it was none of his business. Blazi also states that when they asked who sent him, he responded that he took it upon himself to investigate the illness.

Subsequent to the conversation described by Blazi the Union did not follow up this ''request'' with any kind of written communication. Nor did the Union's representatives ever repeat this request at the negotiating table.

In my opinion, the statement by Blazi to Bartalotta did not amount to a sufficient request which therefore would generate an obligation on the Company's part to respond. For one thing, Blazi's statement doesn't really amount to a request for information, but merely asks if another employee had expressed an opinion regarding the cause of his illness. Further, the practice of the parties throughout the negotiations was to present them formally at the bargaining table and to confirm them in writing through the mail. Under these circumstances, I therefore conclude that in this respect the Employer has not violated the Act.[7]

3. Information regarding employees hired after the strike

The Union commenced a strike against the Employer on September 11, 1989, after the Employer tendered what it described as its final offer. After the strike began, the Employer hired replacement workers. On October 2, 1989, the Union sent a letter to Wilgoren requesting certain information including the following:

> l) The names and addresses of all new employees hired since 8/30/89 their rate of pay, hire date and classification;
>
> 2) The names of Circuit-Wise employees temporarily or permanently transferred to bargaining unit jobs since 8/30/89, their rate of pay and classification.
>
> 3) Any changes in benefits or conditions of employment the company has made since 8/30/89.
>
> 4) Any work which has been subcontracted out since 8/30/89 including the name and address of the subcontractor, the type and quality of work.
>
> 5) Any changes of address, rate of pay, or classification of bargaining unit employees since 8/30/89 as well as any bargaining unit employees who have been terminated since that time, and reason therefor (quit, retirement, or discharge). Please also list which bargaining unit employees have been reporting for work since the strike began.

On October 13, 1989, Wilgoren responded as follows:

> 1) We will not disclose the names or addresses of new employees hired since August 30, 1989 in view of the repeated harassment and threatening conduct which you and your agents have visited upon our employees at the picket line and at their homes.
>
> 2) Your request number 2 is vague and unclear. Please advise me specifically the information you request. Insofar as you are referring to managers or other non bargaining unit employees performing production work, such information is not relevant . . . .
>
> 3) There have been no changes in benefits or conditions of employment since August 30. As you have been previously advised, on October 2 the Company adjusted the wage scales by 2.6% in accordance with its long standing policy of semi-annual adjustment.
>
> 4) The company has not subcontracted out any new work since August 30. You have been previously advised of various subcontracting engaged in by the company prior to that date.
>
> 5) The company is in the process of preparing relevant data contained in your request number 5.
>
> Without waiving the company's position, please advise as to the relevancy of your request for the names of all bargaining unit employees who have been reporting to work since the beginning of the strike.

On October 23 the Union retorted:

> 1) We repeat our request for the names and addresses of all new employees hired since 8/30/89, their rate of pay, hire date, and classification. This information is . . . necessary to us in our capacity as . . . representative and is not for the purpose of ''harassment and threatening conduct'' as you imply.
>
> 2) Our request #2 applies to all employees temporarily or permanently transferred to bargaining unit jobs. This would be the list of employees who previously performed non-bargaining unit work but are presently performing bargaining unit work. These would be workers who would not be on the list of new hires, and do not appear on previous bargaining unit lists. We need name and address, rates of pay and classification.
>
> 3) We repeat our request for a description of any changes in benefits or conditions . . . since 8/30/89. We understand . . . that the company has instituted a policy of free food in the cafeteria, a flex-time policy and even has set up special quarters for napping.
>
> In response to an additional question you raised regarding the relevancy of names of employees reporting to working during the strike—the union plans to send different communications to employees who are in the plant and employees who are on strike.

On March 16, 1990, the Company sent the following letter to the Union regarding the request for information:

> In accordance with your request and after review by the National Labor Relations Board, I am enclosing copies

[7] Inasmuch as I have concluded that there was an inadequate request, I need not decide the extent to which and under what precise circumstances the Company might be required to turn over information of a medical nature. Cf. *New Jersey Bell Telephone Co.*, 289 NLRB 318 (1989), for a discussion of the nature and extent of a company's obligation to furnish information regarding employee medical situations. See also *LaGuardia Hospital*, 260 NLRB 1455 (1982).

of documents which the Regional office found to be relevant. The following documents are enclosed:

1) A list of discharges from September 1, l989 to February 19, l990.

2) A list of voluntary terminations from September l, l989 to February l9, l990.

3) A list of all employees hired from September l, l989 to March 5, l990.

The foregoing . . . was not previously provided . . . because of the Company's concern of the confidentiality of the names and addresses of our employees. This concern was prompted by the acts of violence and vandalism engaged in by the Union and its agents at the picket line since the commencement of the strike. In addition the company was quite concerned with respect to disclosure . . . in view of the numerous acts of vandalism occurring at employees' homes since the commencement of the strike.

The attachments to the above letter included a list of employees hired without their names or addresses. Also set forth were their dates of hire, departments, rates of pay, and classifications.

As indicated above, the Company refused to divulge information regarding employees hired after the strike on the grounds that the strikers had engaged in acts of vandalism and harassment. In this regard the Company filed an unfair labor practice charge against the Union and at least some of the allegations were found to be meritorious by the Regional Office which notified the parties that it intended to issue a complaint against the Union. As a consequence, the Union entered into a settlement whereby it agreed, without conceding fault, to cease and desist from damaging vehicles, threatening employees with bodily harm, following vehicles driven by employees, and throwing objects at employees crossing the picket line. While I do not view the settlement agreement as proof of the 8(b)(1)(A) allegations, I do conclude that the Company had a reasonable basis for believing that the Union engaged in such actions in relation to the strike.

The complaint does not allege that the Company refused to furnish the information as the Union requested it. No doubt because of the evidence of union misconduct, the General Counsel does not contend that the Company illegally refused to give the names and addresses of persons employed after the strike commenced. Rather, the allegation is that the Respondent unlawfully refused to provide the Union with the following information:

a) Rates of pay, job classifications and dates of hire of replacement employees.

b) Rates of pay and classifications of all employees permanently transferred into bargaining unit jobs.

c) Names of any bargaining unit employes terminated since 8/30/89 and the reasons therefor.

The names and addresses of bargaining unit employees are presumptively relevant. *Phoenix Co.*, 274 NLRB 995 (1985). Also, the Board has held that an employer is obligated to furnish the names, addresses, and wage information of strike replacements. *Georgetown Associates*, 235 NLRB 485 (1978); *Soule Glass & Glazing Co.*, 246 NLRB 485 (1979). On the other hand, I can see a justification in refusing to give a union the names and addresses of strike replacements where there is a reasonable and objective basis for fearing that the union will engage in illegal harassment. *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 737 (D.C. Cir. 1969); *Webster Outdoor Advertising Co.*, 170 NLRB 1395 (1968).

In the present case, the General Counsel does not contend that the Union would not be entitled to the names and addresses of the replacement employees. However, I also agree with the General Counsel's contention that the Union is entitled to certain other information regarding replacements. Thus, although there was arguably an impasse prior to the strike, that does not mean that the Union no longer represents the employees in the bargaining unit including those people who come in as strike replacements and do bargaining unit work. Clearly to perform its duty as bargaining representative, a union is entitled to know the job classification, wage rates, and seniority dates of all persons in the bargaining unit whether they participated or did not participate in a strike.

The Company maintains that it did not have to furnish the information because the Union's request was too broad and encompassed materials which were not disclosable. To me such an argument is a non sequiter. To the extent a union requests relevant and unprivileged information, it seems to me that the Company is obligated to comply even if it may lawfully reject demands for other information that may not be relevant. *LaGuardia Hospital*, 260 NLRB 1455, 1463 (1982). Nor do I think the matter is moot on account of the Employer's agreement to turn over the relevant information 5 months after the request was made and only after a complaint was issued. Where information is relevant and readily available, compliance with such request should be made without undue delay. *Tennessee Steel Processors*, 287 NLRB 1132 (1988).

4. Information regarding quality bonuses

In September 1988 the Company, as part of its proposal for a 1-year contract, offered a ''Quality Bonus'' plan. The purpose of this plan was to induce employees to raise both productivity and quality. To that extent, the plan as proposed was in the Company's self-interest and, in large measure, was designed to help the Company and not the Union.

Quality in the production of circuit boards is defined simply as the total number of circuit boards made divided by the ones that work and are shipped. Quantity is defined as the number of lots shipped per week. In 1987 the quality figure was 93 percent. In 1988 the quality figure was 89 percent.

The Company proposed that 1988 be set as the base year. It proposed that if the average lots per week were between 140 and 180, the Company would place $100,000 into a bonus pool for each 1-percent improvement in the quality percentage figure. If average lots were between 180 and 220, $125,000 would be put into the pool for each 1-percent improvement. If average lots were between 220 and 260, $150,000 would be put into the pool for each 1-percent improvement. For example, assuming that the average lots for 1989 were 160 and the quality figure improved by 3 percent, then under the Company's proposal, $300,000 would be put into a pool set aside for employee bonuses.

The bonus proposal also had a provision that quality defects would be subtracted from the bonus pool on a dollar-for-dollar basis.

When this proposal was first discussed in September 1988, the Company gave the Union information regarding the lots and the yields for 1986 and 1987. Also given was similar information regarding the projected figures for the fiscal year ending September 30, l988. On October 19, 1988, the Company gave to the Union the final figures regarding lots and yields for fiscal 1988. On November 15, 1988, the Company pressed the Union on the quality bonus proposal, indicating that it would like to implement this program on an interim basis even before a contract was reached. No agreement was reached. There was no further substantive discussion between the parties about the Company's quality bonus proposal during the course of the negotiations. And the Union, during that time, made no requests for information regarding the proposal. It was, however, included in the Company's final offer presented to the Union on July 18, l989. By its terms the final offer does not limit the quality bonus only to the year 1989. As written it is an offer that would go into effect upon the execution of the agreement.

In a letter from Wilgoren to the Union dated September 28, l989 (after the strike began), he stated that effective October 2 the Company would implement the proposed quality bonus plan as set forth in its final offer.

On October 2, 1989, the Union sent a letter to Wilgoren stating:

> We received your letter today regarding your announcement that Circuit-Wise is unilaterally implementing your quality bonus proposal effective today. On this and the other open proposals we wish to bargain—we are not at impasse and we consider your unilateral implementation another effort to undermine the . . . bargaining process.
>
> In addition, in order to evaluate the proposal we require certain information:
>
> 1) The average lots per week for each fiscal year, from 1980—1988, and the quality, as measured by yields, for each of those years;
>
> 2) The average lots per week, on a week by week basis for fiscal 1989, and the quality measurement for each of those weeks;
>
> 3) Please explain the basis upon which the quality, as measured by yields is determined;
>
> 4) Please list the dollar value of customer returns due to quality defects for each fiscal year, from 1980—1989.

On October 13, 1989, Wilgoren responded as follows:

> Please be advised that the Company is not implementing the quality bonus proposal at this time. Please disregard my prior letter . . . as that letter is incorrect insofar as it stated that the quality bonus was being implemented.
>
> Accordingly, . . . as the Company is not implementing the quality bonus, and due to the fact that you rejected that proposal on August l, l989, your request for information is not timely or relevant.

On October 23, 1989, the Union sent another letter to Wilgoren regarding the quality bonus proposal. This stated:

> [W]e have reviewed the company's quality bonus proposal and wish to repeat our request for information in order to further evaluate the proposal, whether or not the company intends to unilaterally implement it . . . .

On January 5, 1990, the Union wrote to Wilgoren as follows:

> The Union repeats its request for information regarding the Circuit-Wise quality bonus proposal. Any proposal which the company considers worthy of our consideration will receive full consideration from the Union as long as we are given enough information to evaluate the proposal.
>
> So far the Union has not received any of the information requested.
>
> At this time we would like to repeat and update our request:
>
> 1) The average lots per week for each fiscal year, from l980 to l989 and the quality as measured by yields, for each of those years;
>
> 2) The average lots per week, on a week by week basis for fiscal l989 and the quality measurement for each of those weeks;
>
> 3) Please explain the basis upon which the quality as measured by yield is determined; and
>
> 4) Please list the dollar value of customer returns due to quality defects for each fiscal year, from l980 to l989.

On January 17, l990, Wilgoren responded as follows:

> As you know, the parties have discussed the quality bonus proposal and the offer was rejected by the Union on numerous occasions during the 38 negotiation sessions held.
>
> The company has provided sufficient information for the Union to fully understand the proposal. Moreover, the Union rejected the quality bonus proposal when it rejected the Company's final offer.
>
> The request contained in your letter are considered by the Company to be superfluous and irrelevant.
>
> For the foregoing reasons, the request for this information is denied.

Although I conclude that the parties were at impasse upon the Union's rejection of the Company's final offer, this does not mean that bargaining cannot or will not resume in the future. *Hi-Way Billboards*, 206 NLRB 22, 23 (1973). The Company's final offer, including its proposal concerning quality bonuses, was never withdrawn and therefore is still a proper subject of bargaining if and when negotiations resume. The fact that the Company changed its mind about unilaterally implementing the bonus proposal does not mean that the proposal was taken off the bargaining table. Accordingly, as a mandatory subject of bargaining, the Union would be entitled to any information relevant to assess and evaluate the bonus proposal.

The questions are to what extent were the Union's information requests relevant and to what extent has the Com-

pany, to the extent that it has not already done so, refused to give relevant information. The Company's proposal on its face is fairly easy to comprehend and as explained to the Union during negotiations, depends essentially upon arithmetical computations during the period when bonuses are proposed to be given. Using the year 1988 as the base year, the amount of money contributed to the proposed pool would basically be defined by ascertaining the percentage yield figure during the bonus period and to the extent it exceeded 89 percent plugging the number into the formula. As the Company furnished information relative to average lots (productivity), and yields (quality), for 1986, 1987, and 1988, I see no relevancy or purpose to be served by figures going back to 1980. Moreover, the Union has not explained why information covering such a broader period of time would be relevant to it in evaluating the Company's proposal.

On the other hand, as the Company's proposal does factor in customer returns, it is my opinion that the Union would be entitled to know for a representative period of time, the extent to which there were customer returns. In this regard, it seems to me that a 3-year base period would suffice and it is recommended that the Respondent furnish to the Union, on request, information regarding customer returns for any 3-year period chosen by the Union to be representative.

F. *Alleged Unilateral Changes*

1. Regarding waste water treatment employees

The Company's manufacturing process generates a variety of metals and chemicals (mostly copper) that by law are required to be removed before entering the Quinnipaiac River. Consequently, the Company for many years has maintained a waste treatment plant on its premises.

At the time that the Union was certified there were three to four employees who worked in the waste water treatment area of the plant who were classified as ''maintenance service operators.'' These people were included in the bargaining unit and their responsibilities basically were to monitor various gauges indicating the level of pollutants and adding chemicals to remove the waste products from the outgoing water. None of these people were particularly skilled.

In late 1988 due to problems with the Connecticut Department of Environmental Protection, the Company assigned Nancy Smith, its process engineer, and Shelly Albino to evaluate the waste water treatment system. When they ran the system themselves without the employees they discovered that it could meet legal requirements so long as they paid attention to the indicators and carefully followed the directions of the system's manufacturer. They testified that they therefore concluded that the problem was not the system, but rather the employees who were assigned to run the system. (Based on the testimony of Nancy Smith, I think that a good deal of the problem was with the lack of adequate supervision and training that the employees were given.)

On December 15, 1988, the Company notified the Union that it was going to create a position called the waste water treatment technician which would be part of the engineering department. The Union was told that new people would be hired to fill the newly created positions and that these new jobs would not be in the bargaining unit. Wilgoren asserted that the reason for this change was due to state regulations and that it needed people with more technical qualifications to perform the jobs. The Union's representatives said that although it had no objection to a change in the job description or the need for additional training, it did object to the job category being taken out of the bargaining unit. In this regard, the Union pointed out that the bargaining unit included a group of chemical technicians whose pay scale was similar to that of the proposed waste water treatment technicians.

On December 28–29, 1988, the Company posted the job of waste water treatment technicians. About the same time, an advertisement for this position was placed in a New Haven newspaper. On January 4, 1989, the Union objected to the Respondent unilaterally taking this new position out of the bargaining unit. The Union also proposed that the incumbent employees be trained to upgrade their skills. Wilgoren asserted that the Company did not have time to do this and intended to go ahead with its plans even while contemplating the filing of a unit clarification petition. (No such petition was ever filed.) During the meeting, the Respondent advised that it would take a couple of months to accomplish the change and that, in the meantime, the existing employees would continue to operate the waste water treatment system. When the Union stated that the proposed jobs were not different in kind from other technical job categories in the unit, Wilgoren stated that the jobs would not be in the bargaining unit and that the Company would only be willing to talk about the effects on the current employees doing the work.

On January 31, 1989, Nancy Smith gave a presentation as to why the Company needed to create the new position. The Union, while recognizing the need to comply with state regulations, still asserted that this problem could be met with additional training and that even if new and more qualified employees had to be hired, there was no justification for taking the job category out of the bargaining unit. Wilgoren replied that the Company was going ahead with its plans and that the Union could file charges with the Labor Board.

On February 16, 1989, Wilgoren told the Union that the change would take place the following week, that the existing workers would be transferred to other jobs, and that newly hired people would occupy the newly created job classification. While not insisting that the incumbents should be placed into the new classification, the Union still objected to the Company's assertion that the job was now outside the bargaining unit.

On February 20, 1989, the people employed as maintenance service operators were transferred to other jobs within the Company without loss of pay or benefits. At the same time the Company hired four new employees, of which only one, Wedman, had any experience or educational background in handling waste water treatment plants. While it may be that some of the employees who were hired to do this job had a higher degree of general education, the fact is that none had prior educational or work experience in dealing with pollution control equipment. Moreover, the actual work done by the new employees was essentially the same as done by the old employees, albeit done with a greater degree of care.

I do not think that the General Counsel is correct in asserting that the Company violated the Act by unilaterally changing the job classification and hiring new employees to fill that classification. Clearly, the Company notified the Union about this change several months prior to its implementation. It explained its reasons for making the change and in effect,

gave the Union ample time to convince it that the change was not necessary. Indeed, it appears to me that the Union's principal concern was not with the fact of the change, but rather with the Company's opinion that the new jobs would be outside the bargaining unit. Moreover the Company offered to bargain about the effects of the change on the incumbent employees who were not really affected in any significant way. That is, the incumbent employees went to other jobs within the plant and suffered no reduction in wages or benefits.

On the other hand, I see no justification whatever for the Company's contention that these new jobs should be outside the bargaining unit. On the contrary, it is my opinion the new job classification was substantially similar to the old job, requiring at most, a marginal increase in educational background. Virtually all of the job functions of the new classification were done by the old workers, if perhaps with less attention to detail. But that, in my opinion, was largely due to the lack of proper training and supervision. In light of the above, its my opinion that the Company has unilaterally withdrawn recognition from a portion of the bargaining unit. As the bargaining unit in the present case was established by the Board pursuant to a Decision and Direction of Election, and as the new job classification is substantially similar to job categories in the existing unit, it is my conclusion that the parties are required to adhere to the bargaining unit and that neither party may, without the consent of the other, alter the unit. *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1572 (2d Cir. 1989). As stated by the Board in *Arizona Electric Power,* 250 NLRB 1132, 1133 (1980):

> It is axiomatic that parties to a collective-bargaining relationship cannot bargain meaningfully unless they know the scope of the unit for which they are to bargain. Thus, it is well established that the integrity of a bargaining unit cannot be unilaterally attacked, and that once a unit is certified, it may be changed only by mutual agreement of the parties or by Board action. [Citations omitted.]

2. Regarding Blue Cross/Blue Shield

For many years the Company has maintained a medical program. For the vast majority of the employees, the Company has had an agreement to pay Blue Cross/Blue Shield a fee to administer a self-insured plan.[8] As explained by Jeffrey Dowd, the Company's vice president of finance, the Company essentially has committed itself to paying as incurred, such employee medical claims in amounts over a set deductible (paid by the employee) and less co-insurance. In this regard, it should be noted that the Company does *not* pay into any fund a fixed and periodic sum of money to insure covering the claims made. Rather, each year, Blue Cross notifies the Company regarding its guess as to what the Company will likely pay out in medical claims for the upcoming year. This does not establish a premium payment of any kind, and if claims for a given year are less than predicted, the Company keeps the money.[9]

Since at least as far back as 1978 employees have paid for part of the medical coverage through a payroll deduction of 92 cents for single coverage and $1.85 for two persons and family coverage. These amounts were unchanged since l978 and since that time the Company absorbed all or part of the additional costs as they were incurred. [10]

At a negotiation session held on February 16, 1989, the Union asked if the Respondent had a proposal on insurance. Wilgoren stated that they did not have anything to offer at that time because the Company was having discussions with Blue Cross/Blue Shield.

On February 22, l989, Blue Cross/Blue Shield notified the Company that they estimated that the Company's medical costs for the coming year would probably increase by about $250,000.

On February 23, 1989, the Company told the Union that it had received ''new rates'' from Blue Cross/Blue Shield and that it needed an answer to the Company's proposals that day. Wilgoren then proceeded to put on the table a set of three options all of which were designed to increase the costs to the employees either by way of increased deductibles, elimination of benefits, etc. Not having seen these Company proposals before, the Union asked questions. After some discussion, Wilgoren stated that if the Union did not consent to one of the Company's proposed options, the Respondent would pass along the entire ''increase'' to the employees through higher weekly payroll deductions. Wilgoren justified this position by claiming that by passing on to the employees the entire additional cost, this was maintaining the status quo, because the Company's contribution for medical costs remained the same. The Union's chief negotiator viewed the situation quite differently, claiming that the Company's proposal would be, in effect, a unilateral reduction in employee wages. When Wilgoren asserted that there would be a unilateral change if the Company absorbed the added cost, the Union said that they would not file a charge if the Company paid the additional costs. (Note again that this did not represent added current costs but estimated costs as of the year

[8] The Company also offers to its employees medical coverage through a health maintenance organization. Under that plan, the premiums paid are based on the amounts paid for Blue Cross.

[9] The Company does pay Blue Cross for an insurance policy whereby the Company does not have to pay any employee's claim over $75,000. In such a circumstance, the insurance policy will pay the remainder.

[10] Since 1978 the Company has dealt with increased costs in a variety of ways without increasing employee contributions. In 1983 the Company changed carriers to get better rates. In 1984, it raised deductibles and co-insurance. In 1985, it changed the plan in certain ways including adding certain previously uncovered employees to increase the base. In 1986, it again changed carriers to get lower rates. In l987, it implemented a separate deductible for dental claims and adopted an Administrative Services Only contract with Blue Cross to lower costs. It is noted that Dowd acknowledged that in all these years, the Company absorbed at least a portion of the increased costs and never passed on 100 percent of the increases to employees. According to Dowd, on January 30, 1989, Blue Cross notified him that they projected that the Company's projected medical costs for the year March 1, l989, to March 1, 1990, would go up by about 40 percent. (In its brief the Respondent avers that it was notified that its rates would go up. This is incorrect because as described above, the Company does not pay rates. Rather it pays medical bills as they are incurred. One function of Blue Cross is to use its expertise to guess what the totality of those bills will be at the end of the year.)

ending March l, l990.) The Union also advised that just as the Company had rejected any interim agreements proposed by the Union, it would not make any interim agreements that were sought by the Respondent.

On or about February 27, 1989, the Company sent a newsletter to its employees regarding health benefits. This stated, inter alia:

> Unfortunately, the Union rejected the Company's proposal. As a result, by law, we are not allowed to increase our contribution to Blue Cross. *Therefore, until a new package is agreed to by the Union, the increased cost will be paid by employees through higher payroll deductions*.

On March 1, 1989, the Company increased the weekly payroll deductions thus resulting in a net reduction in employees' weekly pay.

On March 3, 1989, Wilgoren stated that inasmuch as the Union had not accepted any of the Company's options, it had, as of March 1, passed on the entire added costs to the employees. The Union characterized this action as being a unilateral change in employee benefits and Wilgoren repeated his opinion that there had been no change because the Company was keeping constant its contribution to the health program. The employee contributions were increased to $6.27 for a single person, $12.52 for two people, and $13.35 for a family.

On March 6, 1989, the Company sent notice to employees stating in substance that because the Union had not agreed to one of the Company's interim agreement options, it was required ''by law'' to increase employee contributions to maintain the present level of benefits. On April 7, 1989, the Union proposed that the ''increase'' be shared 50–50 between the employees and the Company, retroactive to March 1, 1989. The Union repeated this proposal at several later meetings.

In the meantime, the Regional Office of the NLRB issued a complaint alleging that the Company made an unlawful unilateral change when it increased the amount of money withheld from employees to pay for the prospective increases in medical coverage.

Thereafter, on May 17, 1989, the Company stated that it would accept the Union's April 7 proposal if the Union would withdraw the unfair labor practice charge relating to this subject. The Union agreed, conditioned on the agreement being retroactive to March 1. After more debate, an interim agreement was executed whereby there would be no change in the level of benefits and the increases would be shared 50–50 between the Company and the employees. It also was agreed that the Union was not waiving its claims for reimbursement retroactive to March 1, 1989.

In the absence of consent or an impasse in negotiations, an employer may not make unilateral changes in existing wages and benefits while the parties are bargaining for a collective-bargaining agreement. *NLRB v. Katz*, 369 U.S. 763 (1962); *Massey-Ferguson, Inc. v. NLRB*, 78 LRRM 2289 (7th Cir. 1971), enfg. 184 NLRB 640 (1970).

In the present case there clearly was no impasse in the overall bargaining as of March 1989. There was not even an impasse regarding the medical plan issue as of March 1, when the Company implemented the increase in the employees' payroll deductions. The Company asserts that by increasing the employee contribution, it made no change because it simply maintained the existing level of benefits with the same amount of money that it had paid in the past. However, from employees' point of view, the Company's action amounted to a substantial change because in order to maintain the existing benefits, their net pay was reduced by an increase in the payroll deduction. In effect, the employees suffered a pay cut as of March 1, in order to maintain their existing medical coverage.

Clearly health care plans are mandatory subjects of bargaining and an employer may not make unilateral changes in them. Thus, in *Clear Pine Moulding v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980), the court held that the employer violated the Act when, due to increased costs, it unilaterally discontinued payments into one medical plan and purchased a substitute medical plan. In order to restore the status quo ante, the employer was ordered to make whole its employees for any money lost as a result of switching the plans. As the General Counsel points out, *Garrett Flexible Products*, 276 NLRB 704 (1985), is squarely on point. In that case the Board, with Chairman Dotson dissenting, held that the employer violated the Act when it unilaterally passed on to the employees a premium increase. The Board stated at footnote 1:

> [W]e adopt the judge's finding that the Respondent violated Sec. 8(a)(5) by unilaterally increasing the health insurance premium paid by bargaining unit employees without bargaining with the Union. As found by the judge, the Respondent did not have an established past practice regarding the payment of premium increases. Rather, it exercised substantial discretion in allocating the increases between the Company and the employees. Thus, we agree with the judge that the Respondent was obligated to notify and bargain with the Union before passing on the entire premium increase to the employees in July 1984. See *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973).

Regarding the facts of the present case, I also note that the employees were required to increase their contributions not in response to an actual rate or premium increase imposed on the Company by Blue Cross. In fact, there was no actual increase in rates, just a an estimate as to how much medical claims would cost during the following year. Theoretically at least, if claims did not reach anticipated levels, the costs of the existing benefits (i.e., the status quo), would not have increased at all.

Based on the above, it is my conclusion that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally increasing employee payroll deductions to pay for the maintenance of the existing level of health benefits. Simply put, I view this action as constituting a unilateral pay cut.

3. The layoffs at Mint-Pac

Mint-Pac is a joint venture Company set up by the Respondent and General Electric Company. The employees of Mint-Pac who were employed by the Respondent were included within the bargaining unit.

According to Michael Dodd, Mint-Pac's manufacturing manager, in January 1989 a technical problem arose concerning the way in which certain unusually designed circuit

boards were being made for IBM. He states that the Company asked IBM if it could convert the product to conventionally made circuit boards and they agreed. According to Dodd, since the bulk of the employees were working on the IBM process which needed to be discontinued and converted, this created a major problem. (Apparently there were about four employees working on a separate product for a Company called Cinch and those employees were unaffected.)

At the May 4, 1989 bargaining session, the Company announced that four employees working at Mint-Pac had been laid off and had been placed in other jobs at Respondent. (There is no contention that this layoff was caused by anything other than economic factors.) The Respondent further stated that in accordance with past practice, these employees were offered jobs by seniority. (That is the employee with the highest seniority being asked first.) When asked if there was going to be any more layoffs at Mint-Pac, Wilgoren said that he didn't know.

On May 10, 1989, Wilgoren advised Union Representative Hart that 17 more employees of Mint-Pac were scheduled for lay off. He assured Hart that the affected employees would be offered jobs at the Respondent in seniority order and that there would be no bumping of employees in the main plant.

On May 11, 1989, the affected employees were called into McMahon's office one at a time (and in order of seniority), where they were offered certain preselected jobs in the main plant. (That is, these employees were not given the option of selecting any available jobs for which they were qualified, but rather were offered a limited choice of jobs that McMahon thought were suitable for them.)[11]

On May 12, 1989, Hart called Wilgoren and complained that the layoffs were not being done by seniority; that more senior employees like Lonnie Hailey were not being given the same job choices that more junior employees were given. He also mentioned that there was a complaint that one employee was bumped. By letter of the same date, Hart requested clarification of the Mint-Pac business situation as it impacted on the employment of the unit employees. Wilgoren thereafter responded by tendering a list of all Mint-Pac employees who were employed before the reduction in force, setting forth their job classifications and dates of hire. Wilgoren asserted that all employees who had been laid off (with the exception of three) were placed in other jobs without any reduction in pay.

The initial question here is whether under these circumstances the Company had a duty to notify and bargain with the Union about the decision to lay off employees from Mint-Pac. Thus, although the layoff was for economic reasons, it was not really due to a falloff in business. Rather, the layoff came about because the product being produced for IBM could not, because of engineering or design reasons, be manufactured properly by the process then in use. Therefore, with IBM's approval, the Company ceased manufacturing this product by the method employing the affected employees.

In *Lapeer Foundry*, 289 NLRB 952 (1988), the Board stated:

> The Respondent's decision to lay off the employees . . . constituted an economically motivated business decision that resulted in the loss of work for unit employees. In determining the Respondent's bargaining obligation . . . we shall apply the principles set forth in *Otis Elevator Co.*, 269 NLRB 891 (1984) . . . . The plurality opinion . . . applied a two-factor test—whether the decision turned on a change in the nature or direction of the business or whether it turned on labor costs—and concluded that the decision turned on a change in the nature of the business. In a concurring opinion, Member Dennis applied a two step test: (1) Whether the decision was amenable to resolution through the bargaining process, and (2) if so, whether the benefit for labor management relations and the collective-bargaining process outweighed the burden placed on management. Concluding that the decision to consolidate operation was not amenable to resolution through the bargaining process she agreed that the decision was not a mandatory subject of bargaining. Under either the two-factor or two step test, we find that the Respondent's decision to lay off the seven employees for economic reasons was a mandatory subject of bargaining.
>
> When a business is confronted with an economic problem such as declining sales, excessive inventory, or an unprofitable department, it may have several options to address this problem. Management may decide, for example, to lay off employees, to shut down the unprofitable department, or to consolidate operations and transfer work to a more efficient plant. Although job losses may result whether the decision is to lay off, shut down, or consolidate, the focus of the decision to lay off differs from the focus of the other two decision in a critical manner. In deciding to lay off employees, management directly alters employees' terms of employment. This decision, like the decision to reduce workers' wages, necessarily turns on labor costs because the decision itself is to modify terms of employment in order to save money during economic downturns. By contract the decisions in *FNM*, [*First National Maintenance*], to shut down and in *Otis* to consolidate part of the business involved a direct modification of the business structure. Those decisions had only a secondary effect of altering employees' terms of employment. Accordingly, pursuant to the *Otis* plurality two-factor test, the decision to shut down part of the business or consolidate operations affects the scope, direction, or nature of the business and need not be bargained. On the other hand the decision to lay off turns on labor costs and must be bargained.
>
> The *Otis* two-step test of Member Dennis mandates the same conclusion. A decision to lay off is predicated on the assumption that savings will accrue from the reduced labor costs during a period when a full complement of workers is unnecessary. Labor related considerations therefore form the basis for the decision. As a union has control over this labor-related factor, it can offer alternatives to the layoff, such as wage reductions, modified work rules, or part-time schedules for a larger group, in order to save the Company money during the economic downturn. Accordingly, the layoff decision is amenable to resolution through the collective-bargaining

[11] A small number of employees in the Cinch department were not laid off at Mint-Pac. These employees seem to have worked on a process that was separate and apart from the other affected employees and therefore were retained in that department.

> process . . . . Although management has a legitimate concern with the need for speed and flexibility in effectuating a layoff to remedy its economic plight, we believe that the legal requirements that exist to ensure meaningful bargaining in a timely fashion address this concern adequately.
>
> In light of the above analysis, we conclude that the decision to lay off employees for economic reasons is a mandatory subject of bargaining. Consequently, an employer must provide notice to and bargain with the union concerning the decision to lay off bargaining unit employees and the effects of that decision . . . .
>
> In order to illustrate the limits of our holding, we stress that our analysis today applies only to an economically motivated decision to lay off employees. We recognize that a managerial decision is often not easily categorized under a label such as layoff or consolidation. For example the permanent contraction of a Company's work force which might be viewed as a mass layoff, may be part of a change in the scope and direction of the business enterprise and therefor not bargainable under *FNM* . . . .

It seems to me that the decision to lay off employees at Mint-Pac was based on technological grounds and not general business conditions. The employees were employed in making an unusual product by a novel method. In the end that process did not work. As such, I do not see how this situation could have been addressed, much less resolved by collective bargaining.

By the same token, I don't believe that the Company refused to bargain about the effects of the decision. When the Union's representative asked Wilgoren to explain the Company's actions and furnish information, Wilgoren responded promptly. Rather than seeking to bargain, the Union chose to file an unfair labor practice charge instead.

4. Changes in work schedules

A principal customer of the Respondent is Ford Motor Company. Sometime in 1989 sales in the automobile business turned down and as a result Ford's purchase of circuit boards from the Respondent also dropped.

In early June employees in the strip/etch/reflow department were asked to volunteer for furloughs because of a reduction in business. When no one volunteered, the Respondent told the employees in that department that effective June 12, 1989, it was changing the workweek schedule from Monday through Friday to Tuesday through Saturday. In the Photo Department the work schedule was changed to Sunday through Thursday.

David Shumacher, the vice president of manufacturing testified that the change in schedules were put into effect in part to reduce the amount of overtime worked by the maintenance staff. That is, he testified that with fewer shifts working during the week, the maintenance staff could get to more areas on fewer days. Shumacher also asserted that during business slowdowns in 1984 and 1985, the Company had shifted work schedules.

On June 15, 1989, the Union raised the issue of the work schedule changes. Wilgoren responded that he was unaware of them.

On June 21, 1989, Wilgoren stated that the changes were consistent with Company past practice asserting that similar changes were made in 1984 and 1985. According to Union Committee Member Dorothy Johnson, the Company stated that it did not give the Union advance notice because it claimed that it did not have enough time.

After July 4, 1989, the workweek changes were canceled and the employees went back to their old hours and days of work.

Hours of employment clearly is a mandatory subject of bargaining. Thus, absent unusual circumstances, the Company was obligated to notify and bargain with the Union prior to making the changes noted above. Whether or not the Company in 1984 or 1985 made similar changes to accommodate a business slowdown is essentially irrelevant as there was no union representing the employees at that time. As stated by the Board in *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989):

> The Respondent argues that because of its past practice of instituting economic layoffs due to lack of work, it had no obligation to bargain with the Union over such layoffs. However, because of the intervention of the bargaining representative, the Respondent could no longer continue unilaterally to exercise its discretion with respect to layoffs. See e.g., *Ladies Garment Workers Local 512 v. NLRB*, 795 F.2d 705 (9th Cir., 1986). Instead, the Respondent was obligated to bargain with the Union over the layoffs, which are mandatory subjects of bargaining. *Lapeer Foundry & Machine*, 289 NLRB No. 126 (July 20, 1988). Accordingly, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to bargain with the Union over the layoffs.

Also, I reject as unpersuasive any contention that the Respondent did not have sufficient time to notify the Union prior to making the change. Automobile sales did not precipitously drop overnight. I can't imagine that this Company did not see the market trends and was blind to the effects on its product.

It therefore is concluded that the Company violated Section 8(a)(1) and (5) by unilaterally changing hours of work without prior notification to the Union and without affording the union an opportunity to bargain about such changes.[12]

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[12] The Company's employee manual defines premium pay as follows:

> All hours worked in excess of 40 hours per week will be paid for at a one and one-half times rate. Unworked holidays will be credited for overtime purposes.
>
> Work performed on a Sunday or holiday will be paid for at double time. This excludes double time when a person's normal work week begins with a Sunday night start-up.

It seems to me that as to those employees whose workweek was changed from Monday through Friday to Sunday through Thursday, that the remedy should require that they be paid at double time rates for any Sundays that they worked. For employees whose week was changed to Tuesday through Saturday, their entitlement to overtime rates would still be dependent on whether they worked in excess of 40 hours.

G. *Other Alleged 8(a)(1) Conduct*

1. No-solicitation rules

The Company, as part of its manual, maintains the following rules:

> C-2 Unauthorized visiting in departments other than that to which assigned, or leaving the department without permission.
>
> C-4 Congregating in groups for unauthorized discussions, or loafing, littering or wasting time during working hours, including unauthorized extended time in a restroom or cafeteria or at a pay phone.
>
> C-7 Distribution of written and printed materials, vending, selling, soliciting or collecting contributions for any purpose on the property is prohibited during working time. The restrictions contained in this rule do not apply during break periods or meal times or other specified periods during the work day when people are properly not engaged in performing their work tasks.

On June 8, l988, the Company issued a letter to its employees reminding them of its no-solicitation rule. This letter stated:

> The company has, for many years had, in effect a No Solicitation rule. This rule applies to everyone equally. Contrary to the Union's insinuation, the Company takes no position on whether an employee should sign a union card. As we have discussed with you many times, the decision to sign or not sign a union card is yours alone. Don't let anyone pressure you into signing something that is not in your best interest.
>
> The law protects your right to engage in union activity or to refrain from taking part in union activity. Any employee is entitled to solicit during non-working time (during breaks and meal time.) We intend to continue applying this rule to all employees equally. All supervisors have been reminded of our policy and we will not tolerate special treatment for anyone.

The General Counsel does not contend that any no-solicitation rules maintained by the Company are unlawful per se. Rather, he contends that the Company has discriminatorily applied its rules so as to ban talk about the Union while permitting employees to converse about other subjects.

There is evidence from company supervisors such as William Abbate and Merle Ames that employees working near each other, in their departments, will carry on nonwork-related conversations during working time. There also was testimony that from time to time, solicitations occur for such things as girl scout cookies, etc. (However, the nature and extent of such solicitations during working time in working areas was not made that clear.) On the other hand, there was evidence that the employer enforced its rules more stringently insofar as visits by employees from one department to another during working time. There also was persuasive evidence that almost all employees during the course of their work, come into contact with toxic chemicals of one sort or another. Clearly, undue distractions not only could detract from the work being performed, but could also result in harm to the workers themselves. The General Counsel cites five incidents involving employees Francis Blazi, Lonnie Hailey, Lenora Daniels, Janet McCutchen, and Joseph Wingate.

Frank Blazi who worked in the plating department as a floater, was on the union negotiating committee and was one of the stewards selected by the Union. (He was named as a steward on February 23, 1989.) On or about February 28, 1989, Blazi had a heated conversation with another employee, Pat Scirocco, who worked in the maintenance department. The gist of this encounter was that Blazi orally expressed his anger at Scirocco who had indicated that he was not interested in the Union. When John Bartalotta (vice president of manufacturing) appeared and inquired as to what was going on, Blazi said that he was upset that Scirocco had quit the Union. According to Blazi, Bartalotta stated that he was not to be discussing union matters in his department on company time. The conversation between Blazi and Scirocco took place in an area adjacent to, but outside, the plating department while Scirocco was repairing a machine. According to Blazi, he was later told in relation to a different warning that he had received verbal counseling in relation to this incident.

Blazi also testified that in early May 1989, the company made a proposal at the bargaining table to the effect that the employees in the chemical lab be converted from salaried to hourly employees. According to Blazi, when he was delivering samples to the lab, he commented, ''good morning future hourly employees.'' Blazi states that he was then called into Bartalotta's office where he was confronted by Bartalotta and by Supervisors Ken Borkowski and Kenneth Gilbert. He states that Bartalotta said that he understood that Blazi was making overtures to Oscar Carigan on company time, which Blazi denied. According to Blazi, Bartalotta showed him but didn't let him read, a two page letter signed by Carigan and Miriam Nespral (supervisor in the laboratory), and said that I was harassing Carigan. Blazi states that when he said that he didn't think that the Company had any right to prohibit him from talking to other employees about the Union, Bartalotta replied that it was not going to go on in his department.

Lenora Daniels and Janet McCutchen testified that on one occasion, in April 1989 they were talking together when the leadperson, Alina Mazewski, said that she was bringing the message that the supervisor, Chuck Senger did not like the idea of them talking. Daniels and McCutchen were not however, talking about the Union. (Both were moderately involved in union activities. Neither was a member of the negotiating team nor appointed as a shop steward.) No disciplinary action was taken against these employees in relation to this incident.

McCutchen testified that in April 1989 Joseph Wingate, one of the stewards, came into her department while she was working at the Colight machine (function unknown), and told her that the Union was backing her up in relation to some sort of incident she had. McCutchen states that about 5 minutes later, Mazewski told her that she didn't want anyone talking or hanging around the machine while working. No disciplinary action was taken with respect to this incident.

Lonnie Hailey, who worked at Mint-Pac, testified that on February 20, 1989, he brought some union cards with him into the plant and while delivering some materials to the HASL department left some of the cards in the area. He states that he thereupon made eye contact with another em-

ployee so as to indicate where the cards were located. Hailey testified that he did not speak with anyone while in the department.

On February 20, 1989, Supervisor William Abbate made the following report to McMahon based on a report made to him by leadperson Cora Hopkins who did not testify in this proceeding:

> February 20, l989 at 2:05 p.m. in the HEO7 department, Cora Hopkins, the area leadperson, observed and overheard Lonnie Hailey of Mint-Pac give a union membership card and discuss filling it out and returning it, with Charlie Vidro . . . Lonnie Hailey also left approximately five union membership cards in the area before he departed . . . Cora Hopkins took possession of the cards and immediately informed me of the situation. I took possession of the cards and turned them in to Tom McMahon . . . This activity took place at a production line during normal working hours for both Lonnie Hailey and the HEO7 operator. At 2:45 p.m., Lonnie Hailey approached Cora Hopkins andasked her for the blank union membership cards that he had left in the area. He was told that the cards were given to the department supervisor. He departed. Recommended Action: no less than a written warning depending on any previous history.

On February 28, 1989, McMahon issued to Hailey the following written warning:

> You have been instructed that during hours of work you must limit yourself to performing job related duties. On February 20, l989 you were involved in union activities at 2:05 p.m. in HASL. This is a plant rule violation since you were an unauthorized visitor in a department other than your own, interfering with the job activities of an employee in that department. Because of this, I am giving you a written warning with the expectation that this type of unauthorized activity will not happen in the future.

In *Our Way*, 268 NLRB 394 (l983), the Board held, in essence, that rules prohibiting solicitation during working time would be presumptively lawful whereas solicitation bans during ''company time'' would be presumptively invalid. Thereafter, in *Provincial House Living Center*, 287 NLRB 158 (l987), the Board held that the employer did not violate the Act when it banned solicitation or distribution during ''work time'' rather than ''work hours.''

On the other hand a no-solicitation rule which is directed only against union solicitations will be construed as being facially invalid. *Southwest Gas Corp.*, 283 NLRB 543 (1987). Also, a rule which although presumptively valid may violate the Act if it is applied in a discriminatory fashion. *Marathon Letourneau Co. v. NLRB*, 699 F.2d 248 (5th Cir. 1983); *Lawson Co.*, 267 NLRB 463 (1983); *St Vincent's Hospital*, 265 NLRB 38 (1983), enfd. denied in part 729 F.2d 730 (11th Cir. l984); *Hammary Mfg. Corp.*, 265 NLRB 38 (1982). A no-solicitation rule will not be unlawful merely because they allow charitable solicitations as an exception to the general rule. *South Nassau Communities Hospital*, 274 NLRB 1181 (l985). However the Board may examine the level and nature of the solicitations under the exception to determine if the rule is applied in a discriminatory fashion. See *Hammary Mfg. Corp*, supra. In *Restaurant Corp. of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1986), the court in trying to find the dividing line between nondiscriminatory and discriminatory application of a facially valid no-solicitation rule stated:

> Carefully developed legal doctrine indicates that restrictions on union solicitation must be justified by the employer's legitimate concerns for work place efficiency. This is the only sensible way to reconcile the cases in this area. Thus, a ban on solicitation on working time and in working areas is presumptively valid; conversely an employer may not generally prohibit union solicitation or the distribution of union literature by employes during nonworking times or in non working areas . . . . Employees may be restricted to distributing union literature and materials to nonworking time and nonworking hours . . .
>
> Disparate enforcement inherently requires a finding that the employer treated similar conduct differently . . . . This is a fact based inquiry in which the Board proceeds on a case-by-case basis . . . .
>
> [N]otwithstanding the unconditional ban on solicitation, the Company had condoned six general instances of solicitations of its employees for social purposes during the year prior to the discharge of Herbekian and Dameron. These non-union solicitations may be characterized as the ordinary ad hoc expressions of friendship that naturally occur among small groups of people. Most of the solicitations involved individual request during working hours in working places for contributions . . . among a small group of friends and co-workers. While these solicitations probably averaged at least ten workers, (making a minimum total of around 50 to 60 solicitations), they probably took only a few seconds each.
>
> [D]uring scarcely more than a month Herbekian spoke on twenty-two occasions with other employees about the union. These solicitations were concentrated into a short period and each contact occurred on work time in working areas in clear violation of the Company's rule. Moreover, Herbekian violated the no-solicitation rule in systematic fashion . . . . It is equally obvious that Herbekian's solicitations on behalf of the Union were significantly more involved than, say a simple request to chip in for a small gift. According To Herbekian's testimony, her solicitations . . . often involved an explanation of the comparative merits of the union's dental, hospitalization, and legal plans . . . . The interference by Herbekian was substantial, systematic, and concentrated while the interference caused by the social solicitations was comparatively minimal and irregular. Since the interference in the workplace caused by Herbekian's solicitations substantially exceeded that condoned for social purposes, the facts do not support the Board's finding of a disparate application of the no-solicitation rule . . . .
>
> However, when Dameron's single union solicitation is compared with the numerous condoned non-union solicitations, a different situation is presented . . . The interference . . . caused by Dameron's solicitation was

> substantially less than that caused by Herbekian's solicitations and substantially less that the Company condoned non-union solicitations. Thus in discharging Dameron while condoning non-union solicitations that caused greater disruption of the working place, the Company disparately enforced its no-solicitation rule.

Applying the balancing test described above, it seems to me that the warning to Hailey was unjustified by his actions and represents a discriminatory application of the Respondent's no-solicitation rule. Hailey's presence in the HASL department was legitimate because he was making a delivery there. The credible evidence indicates that he did not speak to anyone while there and simply left some union cards in an area where they could be seen and picked up by another employee. (While the Respondent asserted that Hailey conversed with an employee named Vidro, while the latter was handling toxic chemicals, it did not produce any witness to substantiate this claim.) Therefore, there was no interference with production and no action which could reasonably be construed as inducing employees to be careless with respect to chemicals. As there is evidence that the employer allows a degree of nonwork related communications by employees while at work, it is my opinion that the Respondent's issuance of a disciplinary warning to Hailey was grossly disproportionate to his actions and was inconsistent with its normal response to similar nonunion communications by other employees.

I also reach the same conclusion with respect to the verbal warnings or criticisms given to Blazi on February 27 and early May 1989.[14] In both of these situations Blazi spoke briefly to other employees about the Union either in or near where he was scheduled to be working. While in one circumstance, he was involved in a short but heated argument with another employee about the latter having quit the Union, there was no evidence that Blazi interfered with production or created any safety hazard. Here too, the evidence as a whole indicates that Blazi's communications were, apart from their union content, the types of communications that the Company has normally tolerated.

As I conclude that the incidents involving Hailey and Blazi represented instances where the Respondent violated Section 8(a)(1) by the discriminatory application of its no-solicitation rule, it is unnecessary for me to consider the incidents involving Daniels, McCutchen, and Wingate.

2. Alleged disparagement of the Union

Essentially this allegation relates to two related incidents on February 20 and 21, l989. Basically this boils down to a situation where Supervisor Ken Borkowski on one occasion during a meeting of the four employees in the plating department made some moderately obscene comments questioning the masculinity of the Union. According to employee Benitez, similar statements were repeated on the following day. In my opinion these isolated statements by Borkowski merely amounted to name calling and did not rise to the level of actions which are violative of the Act. *Mademoiselle Knitwear*, 297 NLRB 272 (1989); *Newsday, Inc.*, 274 NLRB 86, 95 (l985).

[14] In this context, it is irrelevant whether the statement by John Bartalotta on February 28, 1989, amounted to warning as defined in the Company's disciplinary system or simply a verbal criticism. In either case, the issue here is whether the transaction was an attempt to enforce the no-solicitation rule in a discriminatory manner.

H. *The 8(a)(3) Allegations*

1. Margaret Lewis

Margaret Lewis was employed in the photo department and worked from October 1987 to June 15, 1988, when she was discharged. Her supervisor was Chuck Senger who was admittedly aware of her union activities. Lewis signed a card for the Union in March 1988. She was an active union supporter and her activities included wearing union buttons in the plant and distributing union literature in the cafeteria. She wrote and signed an article which appeared in the union newspaper on March 24, 1988. This article contended that the Company was willing to spend money for a high-priced lawyer to stall the election, but was not willing to do much about health and safety. Prior to the events discussed below, Lewis had a spotless work record and had received no prior warnings.

On June 8, 1988, Lewis told various of the employees in her department that she had observed two of the leadpersons, Alina Mazewski and Rosa Green, engaged in lesbian activities. (In fact, no such thing occurred although one was putting some type of cream on the other to soothe a bad sunburn.) The credible evidence is that Lewis repeated these accusations on or about June 9 at lunch and in the hearing of Mazewski who became extremely upset about it.

On or about June 9 or 10, Lewis was called into Senger's office and questioned about the incident. In this record, the testimony of Senger was that when Lewis admitted the incident, he did not either tell her that what she had done was wrong or suggest that she ought to apologize to Mazewski and Green. Indeed, the tenor of Senger's testimony indicates that he was not really trying to resolve a problem, but rather was seeking to build a record to justify Lewis' discharge. Thus, even after Lewis admitted the infraction, Senger continued to seek out and obtain statements from other witnesses.

On Friday evening, Senger told Lewis that he had orders from Tom McMahon (personnel manager), that she was not to return to work on Monday, June 13 but was to call McMahon instead. On June 15, 1988, McMahon told Lewis that she was discharged.

McMahon, who admittedly was aware of Lewis' union activity, testified that he is the only person who has the authority to make decision to suspend or discharge employees, albeit he makes such decisions based on reports given to him by company supervisors and managers. He also described the operation of the Company's disciplinary rules. Regarding such rules as they relate to misconduct (not as to latenesses and absences), McMahon testified that there were two classes of conduct. One which could lead to immediate termination without prior warnings, and the other which required a three-step procedure consisting of a warning, a suspension, and discharge. In the case of Lewis, he testified that she broke rule A-14 which is grounds for immediate discharge. This rule reads:

> A-14 Engaging in conversation or activity which is intended to detract form or impair a person's, a group's or the Company's reputation.

Notwithstanding McMahon's assertion that the conduct of Lewis warranted immediate termination under rule A-14, it is clear that other employees who were involved in similar or even more serious types of ''slanders'' were not discharged. Thus, company records show that Christopher Ames, David Hall, Alexander Jimenez, and Eva Jenkins engaged in similar or more aggravated types of misconduct on several occasions without being discharged.[15] Moreover, the Company could not cite any other employee who was ever discharged for an infraction of rule A-14 where that employee had no prior disciplinary record.

In my opinion, the General Counsel has established that the discharge of Margaret Lewis, coming soon after the opening of negotiations, was motivated by antiunion considerations. While I do think that Lewis showed poor judgment in telling other employees that the two leadpersons were involved in a sexual encounter, I also believe that this was seized upon as a pretext to justify her discharge. Thus, instead of attempting to correct the situation when Lewis admitted the infraction, Supervisor Senger sought instead to make a record justifying her discharge. Also, it is my opinion that the record in this case shows disparate treatment as described above.

2. Jesus Agosto

Agosto was first employed by the Company in October 18, 1986, and worked for most of his time in the plating department. In December 1988, he transferred to the waste water plant as a maintenance service operator, a job, which as noted above was replaced in late February 1989. On February 20, Agosto was transferred back to the plating department (without loss of pay). Agosto was an active union supporter, wearing union buttons and passing out union literature. He testified in the representation case regarding the supervisory status of leadpersons. He also was designated by the Union as one of its shop stewards on February 1, 1989, and attempted without success, to present grievances to supervisors in early February. As noted above, on or about February 20, he was involved in an unpleasant exchange about the Union with his Supervisor Ken Borkowski.

When Agosto returned to the plating department on February 20, Supervisor Borkowski assigned him to a number of different tasks that Agosto described as leadperson's work. Instead of being pleased with the responsibility given, Agosto apparently felt that he was being mistreated.

On Friday, February 23, 1989, Agosto was assigned by Borkowski to work on the deburr machine and he refused, stating that he didn't like being treated ''like some fucking yo-yo.'' (According to Blazi, it would not be unreasonable for a person employed in Agosto's job category to be assigned to the deburr machine.)

After an exchange of insults, Agosto went to the place where he was assigned, but instead of beginning work, he chatted with the leadman while the other employees were on break. When they returned to work, Agosto then went to the cafeteria where he was seen by Borkowski who asked why he was not at work. After saying that he was taking his break, Agosto went back to the machine and worked for about 2 hours.

At about 11:30 a.m. Agosto was called to the office of Department Manager Bartalotta, who in the presence of Borkowski, asked what had happened. Agosto testified that after he gave his side of the story, Bartalotta told him to go home and call Personnel Director McMahon the next day. On Sunday, February 26, McMahon called Agosto at home and told him that he had been discharged.

Needless to say, the Company contends that Agosto was discharged, not because of his union activities, but rather because of his insubordinate refusal to follow orders. Significantly, this was not the first time that Agosto engaged in insubordinate behavior, as the record shows that he had received a 3-day suspension in August 1988 for refusing a job assignment. Moreover, under the published company rules, a suspension remains active for 12 months and leads to discharge if another violation occurs within that period.

In my opinion, the Respondent has demonstrated that the discharge of Agosto was motivated by factors other than union considerations. As the evidence shows that Agosto refused a direct order to perform work within his job description, and as he had been previously suspended for similar insubordination, I think that the Respondent has met its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

3. Frank Blazi Jr.

Blazi was not an active union supporter until around December 1988 when he came to negotiating session to grieve a warning he had received from his supervisor. Thereafter, he remained on the Union's negotiating committee and was one of the people that the Union designated as a steward.

On February 24, 1989, the day after the Union designated Blazi as a steward, he was questioned by supervisor Borkowski about reading on the job. When Blazi explained that he was reading the company employee handbook while during down time, Borkowski told him ''just do your job.''

On Monday February 27, 1989, Blazi attempted without success to present a grievance to Bartalotta who refused to accept it. Also, as discussed above, Blazi had a conversation in the plant, with another employee named Sirocco about the latter's decision to withdraw from the Union. Later that day, Blazi was given a warning by Ken Borkowski which read:

> Last Friday, *February 24, 1989* I informed you to discontinue reading literature while you were supposed to be performing duties of your job. This occurred at 11:55 a.m. One hour and 10 minutes later, I again saw you reading literature during working hours when you were expected to be performing job duties. Your disregard for adherence to this company rule leaves me no choice but to issue you a written warning for reading of literature while on duty . . . .

When Blazi stated that the warning was not appropriate under the Company's progressive discipline system because it was not preceded by a verbal counseling, he was told by

[15] The case of Eva Jenkins might be somewhat different as she appears to have had a medical condition which was, in some degree, indulged.

Bartalotta that his earlier admonition to Blazi regarding Sirocco constituted verbal counseling.

The Company does have a rule which prohibits ''unauthorized reading of books, magazines or newspapers while on duty.'' The Company also showed that in the past, it has enforced this rule. This was evidenced by warnings given to Wilbur Thorne and June Glenn, respectively on September 9, and October 12, 1988.

On the other hand, the warning given to Blazi was not for reading a newspaper, but rather for reading the Company's employee handbook. While he admittedly was reading during worktime, it was shown that he did so during a period which did not interfere with his job. Further, to the extent that the warning was predicated on an earlier verbal counseling (a necessary predicate under the Company's procedure), I have already concluded above that Blazi had been engaged in protected concerted activity for which disciplinary action would be unlawful. I therefore conclude that the warning to Blazi on February 27 constituted a violation of Section 8(a)(1) and (3) of the Act and is an example of a rule more strictly enforced for union activists than for ordinary employees.

In May 1989 Blazi received his regular 6-month evaluation wherein he was rated as ''above satisfactory.'' (The rating system has five steps from unsatisfactory to outstanding. Above satisfactory is the second highest rating and merit raises were geared to the rating system.) When Blazi discussed his evaluation with Borkowski he stated that he thought he should have been rated as outstanding. Although Borkowski upgraded Blazi in one area (housekeeping), he did not change his overall evaluation. As a consequence, Blazi decided to appeal his evaluation through the Company's problem-solving procedure.

Blazi testified that when he spoke with Bartalotta about the evaluation, Bartalotta agreed that Blazi was an outstanding employee and would have gotten that rating if he (Blazi) was not off ''on so many tangents.'' According to Blazi, Bartalotta in response to Blazi's inquiry mentioned among other things the Scirrocco incident.

Bartalotta denied saying anything about Blazi's union activities when discussing the evaluation. However, he did cite among the reasons for the evaluation, a warning given to Blazi in December 1989 which had been retracted and the previously described warning of February 27 about reading.

In deciding this issue I have credited the account of Blazi. Thus, I accept his testimony that he was told by Bartalotta that he would have received an outstanding rating were it not for the fact that he was ''off on so many tangents,'' meaning Blazi's union activities. Moreover, I would reach the same conclusion even if I credited Bartalotta's account as it is evident that a reason for not giving Blazi the outstanding rating was because of a revoked warning on one hand and an illegally motivated warning on the other.[16]

4. Javiar Cruz

Cruz received a verbal counseling on February 24, 1989, allegedly for having three attendance incidents in that month. These, according to the Company, consisted of leaving early by 3 hours on February 20, being 3 minutes late on February 21, and being absent on February 23.

Cruz who was employed at Mint-Pac was elected by the employees of his department as a shop steward in January 1989. The Company was notified of this action by letter dated January 31.

About 2 weeks before February 23, 1989, Cruz notified his supervisor, Jim Semsel, that he was going to take off on February 23 because his wife was scheduled to have surgery on that date. He again reminded Semsel that he would be out on the day before February 23. Semsel did not tell Cruz that under the Company's policy Cruz might be disciplined if he was absent on February 23. (That is, the Company asserts that it has a strict policy of imposing disciplinary action without consideration of fault, against any employee who has three absences and/or latenesses in any given month.) Semsel also did not inform Cruz that to avoid discipline, he (Cruz) could take a personnel day or a portion of his vacation to which he was entitled. Therefore, Cruz, who had duly notified his supervisor that he was going to be absent on February 23, thereafter discovered to his surprise, that he had been given a disciplinary action.

As in the cases of Margaret Lewis and Frank Blazi, it is my opinion that the Company has applied its rules in a discriminatory fashion to impose disciplinary action against union supporters. Thus, even if the Company has a uniformly applied rule regarding absences and latenesses, the transaction here looks more like the springing of a trap than the valid exercise of discipline to correct attendance deficiencies. Clearly Semsel was aware that Cruz' wife was going into surgery and would be out on February 23, 1989. He also was in a position to know (or find out), that Cruz already had two lateness/absence occurrences in February. Given these circumstances, I find that the only rational explanation for Semsel's failure to notify Cruz of his option to take a personnel or vacation day so as to avoid discipline, was the desire to build a disciplinary record against Cruz who was an active and open union supporter.[17]

5. Joseph Wingate

Wingate was employed on the second shift in the plating department. On January 31, 1989, the Company was advised that he was one of the Union's shop stewards.

On or about February 22, 1989, Wingate asked permission from his supervisor to go to a convention of the Union's District Counsel to be held in Peabody, Maine, on February 24. When his supervisor told Wingate that he could not authorize such time off, Wingate went to and told Borkowski that he wanted to go to the union meeting. Borkowski replied that if Wingate went, he would be written up (i.e., given a disciplinary warning).

On February 24, Wingate went to the meeting accompanied by employees Lonnie Hailey and Dorothy Johnson. On his return to the plant, Borkowski told him that his absence went on his record. A couple of days later, Borkowski

[16] Borkowski testified that one reason that he did not give Blazi a higher rating was because he was hitting the foot-switch on his machine too much and therefore slowing it down. Nevertheless, these actions which were denied by Blazi, were not cited in any evaluation that Borkowski made of Blazi.

[17] I also note the timing of this warning which tends to show a retaliatory motive. The Union had filed a complaint with OSHA which conducted an inspection of the plant beginning on February 16, 1989. As noted above, that inspection generated a degree of fractiousness between the Respondent and the Union.

and Bartalotta told Wingate that his absence was not excused and that if he had two more similar incidents he could be fired. Wingate was told that it was not necessary for him to take time off to go to a union meeting; that they thought it was more important for Wingate to be inside the factory.

McMahon conceded that the Company and the Union had agreed that absences for ''union business'' would not be counted against an employee so long as adequate advance notice was given to the employee's supervisor. As such notice was given and as the Company has not attempted to prove any compelling reason to deny Wingate's request to go to the Union's convention, I conclude that it violated Section 8(a)(3) by charging him with an unexcused absence.

6. Jeremia Samuel Jr.

Samuel was employed in the drilling department and was scheduled to work from 9 a.m. to 5 p.m. which meant that his work overlapped between the first and second shift. Although Samuel claims that he was not supervised during the period from 3 to 5 p.m. I think that this assertion is absurd and I don't credit it.

During his brief stint of employment, Samuel, apart from signing a union card, was not active in the Union. Moreover, there was, in my opinion, insufficient evidence to show that the Company was aware of his membership.

The evidence establishes that in the 2 months prior to his discharge on May 5, 1989, Samuel, during his probationary period, was warned on several occasions regarding his attendance and tardiness record. The evidence further establishes that Samuel was also repeatedly spoken to about his habit of wandering off from his designated work areas.

In summary, it is my opinion that Samuel was discharged for cause and not because of his union sympathies or activities.

7. Lonnie Hailey

Lonnie Hailey was an extremely active union supporter, a fact which was known to the Company. Among other things, he was on the Union's negotiating committee and was appointed by the Union to accompany the OSHA inspectors when they toured the plant in February 1989. In March 1989 Hailey was elected to be the Union's Recording Secretary.

Hailey began his employment on June 15, 1989, and worked at Mint-Pac until May 1990 when there was the reduction in force. At that point he was transferred over to the drilling department of the main company.

On February 28, 1989, Hailey received a warning for his conduct on February 20 and this related to the incident when he left a union card for another employee in the HASL department. I have already concluded above that this warning constituted a violation of the Act.

In April 1989, Hailey had two absences and one tardiness. On May 3, 1989, instead of receiving the normal verbal counseling (of lower consequence), Hailey received a written warning which read:

> On February 28, l989, you received a warning for an unauthorized visit in a department other than your own and interfering with the job activities of an employee in that department. During the month of April you have incurred three attendance incidents (two absences, and one tardiness). Because of these deficiencies I am giving you a written warning with the expectation that you will favorably solve this problem. If . . . you are in violation of this or any other company rule, you may receive a more severe form of corrective, progressive disciplinary action, including discharge.

Since the issuance of this written warning was predicated on the prior illegally issued warning of February 28, 1989, it follows that this action was violative of the Act. That is, in the absence of the prior unlawful warning, the normal company action would have been to give Hailey a verbal counseling which is at a lower level of the Company's progressive disciplinary system. See *Crestfield Convalescent Home*, 295 NLRB 525 (1989).

Subsequently, on August 25, 1989, Hailey received a 3-day suspension for attendance deficiencies in July. As this level of discipline was based on the earlier and illegal written warnings of February 28 and May 3, I conclude that the suspension was also violative of Section 8(a)(3) of the Act.

8. Lennora Daniels

Daniels worked on the second shift from 3 to 11 p.m. as a photo printer. Her supervisor was Chuck Senger and the leadperson in her area was Alina Mazewski. Her union activities were modest. She handed out a union newsletter in the cafeteria and wore union T-shirts at work. On the other hand she was not a member of the Union's negotiating committee and she was not one of the employees elected to be a steward.

On the evening of April 19, 1989, Daniels was asked to work overtime by Mazewski, who in the absence of Senger was the acting supervisor. Sometime between 10:30 and 10:45 p.m. a security guard reported to Daniels that the tire on her car was low. Daniels then went over to Mazewski to tell her about the tire that she would be a little late for the overtime shift. According to Daniels, Mazewski shook her head up and down thereby indicating approval. (Employees are given a 10-minute break between the end of their shift and the commencement of overtime work. Therefore Daniels would be required to be back at her work station commencing at 11:10 p.m.)

At about 10:55 p.m., prior to the end of the shift, Daniels and another employee Bernard Young went to the parking lot. Upon her return, Daniels was told by Mazewski that the next time she left before the end of the shift, she should tell Mazewski first. At this point, Daniels and Young left the plant and drove to a gas station to get air. They returned at about 11:25 p.m. or 15 to 20 minutes after the start of the overtime shift. Upon her return, Daniels was confronted by Mazewski regarding the amount of time away from work and told to go home. Daniels, who was not given an opportunity to state why she was delayed, uttered a profanity to Mazewski and the latter wrote up the incident as follows:

> On April 19, 1989 around 10:40 PM, Lennora Daniels came to me, Alina Mazewski, concerning a flat tire. She asked my permission to go and check on it. I told her yes at her break time which was at 11:00 PM since she was working overtime. Lennora left to check on her tire before 11:00 PM without my permission. Lennora came back at 11:00 PM and left again, she didn't return until 11:30 PM. Since she was 20 minutes late, I told

> her she could not work overtime. I told her to punch out, after she punched out, she came up to me and said ''Alina you're fucked-up'' in Brian Cumming's presence. Brian asked Lennora to leave. Lennora Daniels is well aware of Company policy in regards to punching out when leaving Company property. On occasion when leaving company property during the meal break Lennora has punched out when leaving and punched back in upon returning to work. Also this policy was discussed at a department meeting held approximately 2 months ago.

On April 20 Daniels was called to a meeting with Manager Bill Abbate and Mazewski to discuss the incident. After talking to the people involved including Young,[18] Abbate wrote up a memorandum recommending that Daniels be discharged for the following reasons:

> 1. Insubordination the fact that Lennora left her work station prior to break after being told not to.
> 2. Leaving the company property without punching out.
> 3. Swearing at a leadperson (who is acting as supervisor while Chuck Senger is on vacation)

On Wednesday, April 26, 1989, Daniels was told by McMahon that she was being discharged for being in violation of the rules. According to McMahon, Daniels was discharged for violating rule A-11 which states that an employee would be subject to discharge without prior disciplinary actions, for: ''Leaving the property while on duty without management permission.'' Note that the decision to discharge Daniels was not based on her cursing at Mazewski or the fact that she went to the parking lot for a brief period of time shortly before the end of her shift. Note too that no disciplinary action was taken against Andrew Young who went and returned with Daniels.

In my opinion the facts surrounding the discharge of Daniels indicates a disparate application of company rules to punish union supporters. Although it is claimed that Daniels was in breach of a company rule prohibiting employees from leaving the premises without permission, the fact is that she was given permission to leave at breaktime to check her car. It therefore was not unreasonable for her to go to a local gas station during her breaktime to get her tire filled rather than risk being stuck at the plant at 3 a.m. in the morning. Since there is no dispute that Daniel's tire was low on air, that Mazewski had given her permission to leave and that Daniels, at most, was 20 minutes late for the overtime shift, the punishment of discharge, was in my opinion, grossly disproportionate to the alleged offense. Moreover, it clearly was carried out in a disparate manner as Young was not given any disciplinary action for the same incident.[19]

In light of the above, and in view of the fact that Daniels' union activities were carried out openly, I conclude that her discharge violated Section 8(a)(1) and (3) of the Act. As stated by the Board in *White Oak Coal Co.*, 295 NLRB 567 (1989):

> In a case turning on employer motivation, it is not for the judge to offer reasons not advanced by the employer to justify the employer's actions. Here, the Respondent, to rebut the General Counsel's prima facie case, stated, through Deel, that it discharged Coleman for being absent for work for 2 consecutive days. The Respondent did not state that it discharged Coleman for showing an affront or indifference to management's rights. Given that Coleman was not absent from work on Saturday, the Respondent's proffered reason for the discharge was false and must be deemed a pretext. Further, the Respondent's reliance on a reason for the discharge that was ''clearly wrong'' lends support to a finding that the discharge was for unlawful reasons . . . .

9. Rose Puccino

Rose Puccino worked at Mint-Pac as a screener setup operator. She was employed from May 31, 1988, until May 12, 1989, when the layoffs at Mint-Pac occurred. At the time of her layoff she worked on the first shift.

Puccino's union activities were much the same as Lenora Daniels in that she wore union shirts and distributed union literature from time to time. There was uncontested evidence that Supervisor Semsel was aware of her union activity.

Puccino received a written warning on February 10, 1989, regarding attendance problems. There is no dispute that this warning was not discriminatorily motivated. This warning stated:

> On January 17, 1989, you were verbally counseled concerning attendance deficiencies (tardiness). Since that time, and also during the month of January, 1989, you have incurred seven additional incidents of tardiness. Because of this problem, I am giving you a written warning with the expectation that you will satisfactorily resolve this matter right away.
>
> If in the immediate and ongoing future your attendance does not show significant improvement, or if you are in violation of any other Company rule, you will receive a more severe form of corrective, progressive disciplinary action, including discharge.
>
> This is a *WRITTEN* warning notice.

On April 28, 1989, Chuck Semsel, in response to Puccino's request to leave early told her that as she had two lateness incidents that month, any other attendance incidents would lead to a suspension. Puccino therefore remained at work.

According to Puccino, on April 29 she had a flat tire on the way to work and called in to report that she would be

[18] Abbate claimed, contrary to the testimony of Andrew Young, that when asked, Young denied hearing Mazewski give Daniels permission to leave. Yet it must be recalled that Mazewski conceded that she did in fact give Daniels permission to check her tires at breaktime. There is therefore no real dispute that Daniels was given permission to do something regarding her automobile.

[19] The Company's evidence does not establish that other employees were treated similarly for breaching rule A-11. In this respect the records offered show that five employees discharged under this rule were each terminated after leaving the plant in the middle of their respective shifts and after being denied permission to leave or not receiving such permission. I therefore do not believe that any of these situations is consonant with the facts surrounding the discharge of Daniels.

late. She testified that she was only able to reach Gerald Green, a leadman in another area, and told him that she would be late because of the flat. She also states that when she told Green that she was worried about being suspended because this of what Semsel had told her the day before, Green replied that he would take care of it and that she shouldn't worry because she had a legitimate excuse. (According to Puccino, Green told her on May 1, that he had spoken to Semsel about her lateness on April 29 and that it was taken care of. Green was not called to rebut this testimony.)

On May 3, Semsel wrote up a situation sheet regarding Puccino's latenesses in April and recommended that she be suspended. According to the unrebutted testimony of Puccino, this was the same day that she was reminded by Semsel that she could not hand out union literature at the beginning of the shift. On Friday, May 5, Puccino was told by Semsel not to come to work on Monday and to call McMahon instead. When Puccino asked what this was about, Semsel told her that she had three lateness incidents in April and that it was of no consequence that she had a good excuse for the third. Thereafter on May 9, 1989, Puccino received a 3-day suspension from McMahon.

The Company asserts that it has a no-fault attendance/lateness policy. In this regard, McMahon testified that if an employee has three or more incidents in a given month where he is late, absent, or leaves early, that will lead to progressive discipline. This starts with verbal counseling, goes to a written warning, to suspension and ultimately to discharge. McMahon also testified that the policy is a no fault policy in that no excuses are allowed for lateness or absence. There is however, nothing in the employee manual which notifies employees of this no fault policy. Indeed, although the manual expresses the importance of attendance, it also states that ''we realize that from time to time, you will have valid reasons for being absent or tardy.'' Moreover, the manual does not notify employees of a rule that any combination of three or more absences or latenesses during a month will lead to some form of disciplinary action. In the plant rule section of the manual, setting forth a wide variety of offenses, the only mention of latenesses or absences is rule C-3 which makes it an offense for an employee's ''failure to notify management of inability to report to work as early as possible on the first day of absence.''

There is no question but that discipline has been meted out to employees for excessive latenesses or absences. The question here is whether Puccino, in receiving the 3-day suspension, was treated differently or the same as other employees.

Company records introduced into evidence show that one employee in the main plant, David Hall, received a suspension for attendance problems after having received a prior verbal counseling and a written warning. On the other hand, the Company's records show that the rules regarding attendance were not so strictly enforced at Mint-Pac where Puccino worked. Thus, the only disciplinary action that Graciella Vargas received was verbal counseling on April 27, 1989, for her April latenesses. Nevertheless, she had four latenesses in January, six latenesses in February, and eight latenesses in March. (She received no disciplinary action in any of those months.) Amporo Dussan left early and was late three times in March 1989. In April 1989 she was late eight times, left early three times, and she received verbal counseling for those attendance deficiencies. In May 1989, Dussan had one absence, one lateness, and one early quit but received no disciplinary action. Ken Majeske was verbally counseled for attendance on October 26, 1988, and received a written warning for latenesses in November 1988. Five months later, Majeske received a verbal counseling for two latenesses and two absences in April 1989. In May 1989, he received a written warning for absences and latenesses in May. In June Majeske received another written warning for attendance deficiencies during that month. At no time did Majeske receive a suspension. Robert Olson another Mint-Pac employee who was late three or more times during December 1988 and January and February 1989, received no disciplinary actions at all.

In my opinion the General Counsel has demonstrated that Puccino, who was an open and known union supporter, was treated in a disparate manner from other similarly situated employees in the Mint-Pac division. I therefore shall conclude that the Respondent violated Section 8(a)(1) and (3) by giving her a 3-day suspension on May 9, l989.

10. Transfer offers to Puccino and Hailey

As noted above, there was a substantial layoff at Mint-Pac in May 1989 caused by technological problems. This resulted in the cancellation of the production line doing work for IBM and required the Company to either layoff or transfer the employees working on that product line to other areas of the Company.

With respect to procedure, McMahon testified that the most senior employees would be given first choice within a range of jobs selected by him. He testified that although transfers would be offered by seniority, he made the selection of the jobs to be offered to the individual employees, making an attempt in to match skills, job grades, etc. That is, according to McMahon, the most senior person although given first choice as to jobs did not have carte blanche in selecting from the jobs then available in the plant. Also, employees would not suffer a reduction in pay, irrespective of the jobs they were offered and accepted. Of the group affected by the layoff, the two most senior employees were respectively, Puccino and Hailey.

About a week before May 11, 1989, Puccino asked Michael Dodd, the manufacturing manager of Mint-Pac (and whose testimony I credit), if she could be laid off. She told him that she had babysitting problems and had some eligibility left for unemployment benefits. (Puccino's daughter was 12 years old at the time.) He rejected her request as being against company policy.

On May 11, 1989, Puccino, being the employee with the highest seniority, was the first employee called into McMahon's office. According to Puccino, she was told that she could choose among three jobs, one in the drilling department that didn't have overtime, one in the HASL department which involved the handling of chemicals, and one on the third shift. Regarding the offers, McMahon testified that he also offered Puccino a job as a final inspector on the first shift. In any event, Puccino turned down the jobs offered and ''chose'' to be laid off instead.

In August 1989, the Company offered Puccino a job that opened up at Mint-Pac and that was on the second shift. Puccino also rejected that job.

It is the General Counsel's contention that Puccino should have been offered jobs that other less senior employees were offered, that McMahon chose the jobs offered to her with discriminatory intent, and that Puccino therefore ''chose'' to be laid off as a result of this discriminatory action. Consequently, the General Counsel argues that Puccino was constructively discharged in violation of Section 8(a)(3) of the Act. I do not agree.

Faced with the necessity to reduce its labor force at Mint-Pac, the Company chose to offer job transfers in order of seniority. I credit McMahon's testimony that he attempted to match employees to the jobs available in terms of skills, experience, labor grades, etc. The first-shift jobs offered to Puccino were regular bargaining unit jobs which, if accepted, would have given her the same rate of pay and the same level of benefits as her Mint-Pac job that was being eliminated. Nor were they shown to be more onerous.[20]

In my opinion the General Counsel has not established that the range of jobs offered to Puccino on May 11 were discriminatorily motivated or were selected with the intent to cause her to resign. Moreover, it is my opinion that Puccino chose to take a layoff, not because the jobs offered were undesirable but for reasons of her own as evidenced by her previous request of Michael Dodd to be laid off.

In Hailey's case, he was initially offered a job in the HASL department. When he expressed his negative reaction to that job, he was offered a job in the drill grinding department which was on the same shift and paid the same wage rate and benefits as he had at Mint-Pac. When Hailey asked if there were any other jobs available, such as a porter's job, McMahon said no and Hailey accepted this transfer. As in the case of Puccino, I do not think that the Company had an obligation to offer Hailey any job that he would have liked. Rather, I think that the Company could take into account nondiscriminatory factors including a desire not to transfer an employee to a job requiring skills beneath the ability and talents of the employee affected. Although I have previously concluded that the Respondent discriminated against Hailey in other respects, I do not think that the General Counsel has established in this instance, that the job transfer offer that Hailey accepted in May 1989 was motivated by discriminatory reasons.

I. *Nature of the Strike*

The General Counsel contends and I agree that the strike which commenced on September 11, 1989, was an unfair labor practice strike.

A strike which is caused or prolonged by an employer's unfair labor practices, *even in part*, is an unfair labor practice strike entitling the strikers to immediate reinstatement upon their unconditional offers to return to work. (When such an offer to return is made, the employer would be required to terminate permanent strike replacements in order to make jobs available to the strikers.) That the strike may also be motivated by economic considerations is not relevant. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Drivers Local 662 v. NLRB*, 302 F.2d 908 (D.C. Cir. 1962); *Northern Wire Corp.*, 291 NLRB 727 (1988); *Workroom For Designers*, 274 NLRB 840, 856 (1985). Moreover, the fact that a strike commences some time after the commission of the unfair labor practices is not sufficient grounds for asserting that it was not motivated by the employer's unfair labor practices. *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180 (7th Cir. 1990). On September 8, 1989, there was a notice of a strike vote distributed by the Union to the employees. This read:

> The ballot in this strike vote shall ask: ''Shall the employees of Circuit-Wise conduct an Unfair Labor Practices Strike?'' Members shall vote ''Yes'' or ''No.''
>
> The Union is recommending that Circuit-Wise worker decide whether or not to conduct an *Unfair Labor Practices Strike*, rather than any other type of strike, because the National Labor Relations Board and all Federal Courts have consistently upheld the guaranteed right of Unfair Labor Practice strikers to return to their jobs at the conclusion of such a strike.

A majority of the employees present at the meeting voted ''Yes,'' and the strike ensued on September 11, 1989. Clearly the evidence shows that the group motivation for the strike was to protest the unfair labor practices that have been alleged in this proceeding. Inasmuch as I have concluded that many of those allegations have merit, I conclude that the strike was an unfair labor practice strike.

J. *Denial of Vacation Benefits*

The Respondent's vacation policy as set forth in its employee manual is as follows:

> VACATIONS
>
> A Schedule of vacation time for hourly people based upon credited length of service is presently in effect and will be reviewed periodically for possible modification as the need for change arises. Listed below is the eligibility schedule for paid vacation time.
>
> Less than 10 months - 1/2 day for each full month before June 1 of vacation year not to exceed 5 days
>
> | | |
> |---|---|
> | 10 months to less than 2 years | 1 week |
> | 2 years to less than 8 years | 2 weeks |
> | 8 years to less than 15 years | 3 weeks |
> | 15 years to less than 25 years | 4 weeks |
> | 25 years and over | 5 weeks |
>
> Vacation pay will be distributed on either the Thursday or Friday just prior to the vacation period.
>
> Approved vacation changes will be accommodated whenever possible, but dependent upon the timing of the request, vacation pay may or may not be available before the newly approved vacation time is taken.

[20] The General Counsel asserts Puccino's job at Mint-Pac had provided her with a good deal of overtime. He therefore contends that the offer of a first shift job without overtime made the offered job less desirable. Overtime, however, is not a matter of right and is dependent upon the level of business. At the time that Puccino was being offered few overtime hours versus a job at Mint-Pac which was about to offer zero hours.

In practice the Respondent each year distributes to the employees a form stating how much vacation time every employee has available to use during the coming year period from June 1 through May 31. As the plant is shut down for 40 hours during early July, which is counted as part of an employees' vacation time, any remaining time accrued by an employee can be used as he or she sees fit, subject to company approval regarding availability. For example, an employee who, as of June 1 of a given year, has accumulated 2 weeks of vacation, that employee will be required to take 1 week during the plant shutdown in July and can generally take the remaining week whenever he or she chooses. (Employees can also break up their excess time using a day here or there.)

McMahon testified that employees must use or lose their vacation time. He testified that in order to receive vacation pay, an employee must actually take vacation time except in those situations where the employee either quits or is fired. In that case, according to McMahon, the accrued vacation pay is given at the time of an employee's termination.

McMahon's description of the vacation policy described above is not consistent with the employee manual which is quoted above and has no such condition. Moreover, his testimony that employees must take vacation time to receive vacation pay was effectively contradicted by employees who stated that they had received vacation pay during years when they had not taken vacation time due to disability or other reasons.

As of the date of the strike (Sept. 11, 1989), many of the strikers, particularly those that had been employed longer than 2 weeks, had accrued paid vacation time in accordance with the terms of the employee manual. However, because of the strike, many of these people had not taken the vacations that they otherwise were entitled to take. (As noted above, the amount of vacation time an employee had accrued for the year June 1, 1989 to May 31, 1990, would be based on the number of years' service that employee had as of June 1, 1989. Thus, by the start of the strike, the strikers had already accrued whatever vacation pay entitlement they were supposed to receive for the year ending May 31, 1990.)

On January 22, 1990, the Union sent a letter to the Company as follows:

> It has come to our attention that there are many strikers who have not received their 1989 vacation pay. On behalf of all of the strikers, we are writing to request that any vacation pay that hasn't been paid to date, be sent to each striker with a summary sent to the Union.

On January 29, 1990, Wilgoren wrote back as follows:

> As you may be aware, it is the Company's policy not to pay vacation pay in lieu of time off. This policy has been uniformly applied by the Company. I call your attention to page 41 and 42 of the Company's Employee Manual which has previously been give to you. ''Vacation pay will be distributed on either the Thursday or Friday prior to the vacation period.''
>
> The only time the Company pays for accrued vacation time is when an employee's employment with the company is terminated either voluntarily or involuntarily.

On February 19, 1990, the Company issued a communication to its employees stating:

> [T]he Union has requested that we pay strikers any remaining l989 vacation pay. It is the CW policy that we distribute vacation pay only when time off is scheduled and approved for vacation purposes. The only time vacation payment is made in lieu of scheduled vacation taken is when an employee is terminated or voluntarily quits.
>
> This is the CW policy and it will be followed without exception.

Subsequent to a charge being filed on the vacation pay question and upon notification that a complaint would be issued, the employer on June 1, 1990, sent the following letter to the strikers:

> Enclosed is a check representing your remaining vacation entitlement as of May 31, l990.
>
> [I]t has been the Company's policy not to pay vacation pay unless vacation time is taken. However, due to the unique circumstances of the strike, for this year only, we will allow employees to take vacation pay without taking time off.

In *Texaco, Inc.*, 285 NLRB 241 (1987), the Board stated:

> [T]he question of whether an employer violates Section 8(a)(3) or (1) by refusing to continue benefit payments to a disabled employee on commencement of a strike will be resolved by application of the test for alleged unlawful conduct [set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).
>
> Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike.
>
> Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights, the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits . . . . Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be ''inherently destructive'' of important employee rights or motivated by anti-union intent.[21]

In the present case, the evidence establishes that the striking employees were denied their request for vacation pay because they were on strike. Also, it is clear that for those strikers who had been employed for at least 2 years, they would have accrued vacationentitlements as of the commencement of the strike assuming that they had not used up

[21] Recent cases explicating the *Texaco* test include *Glover Bottled Gas Corp.*, 292 NLRB 873 (1988); *Nuclear Fuel Services*, 290 NLRB 309 (1988); *Helca Mining Co.*, 286 NLRB 1391 fn. 1 (1987); and *Bill-Mar Foods*, 286 NLRB 786 (1987).

their vacation time between the time of the plant shutdown in July and before the strike started.

The Company argues that it had nondiscriminatory business justification for refusing to pay these benefits. Thus, McMahon testified that the Company's policy was that employees had to take vacation time in order to receive vacation pay and that unless used during a given year it would be forfeited. On this point I do not credit McMahon for several reasons. First, if this was the existing policy then it should be contained in the employee manual which is used by the Company to advice employees as to their benefits from and obligations to the Company. Second, the evidence indicates that employees who have been out of work for reasons other than vacation have received vacation pay. Indeed, that fact alone establishes a discriminatory intent vis a vis the strikers as it shows disparate treatment between people who supported the union and people who did not. (This conclusion is buttressed by my findings above, that the Company has enforced various other rules in a disparate manner so as to punish union supporters.)

The fact that the Company after a substantial delay paid the accrued vacation benefits to the strikers does not make this issue moot. For one thing, the delay in and of itself, would constitute a violation of the Act. *NLRB v. Borden, Inc.*, 645 F.2d 87 (1st Cir. 1981). Further, the payments were made only after a complaint was issued and the Company continued to insist, as it does here, that it is entitled to deny such benefits in the future.

CONCLUSIONS OF LAW

1. By preventing a union designated employee from speaking with or questioning other employees during a safety inspection tour conducted by the Occupational, Safety and Health Administration (OSHA), the Respondent has interfered with the rights of employees to engage in union and protected concerted activity within the meaning of Section 7 of the Act.

2. By refusing to allow a union designated expert to visit the plant for the purpose of making a safety inspection, the Respondent has violated Section 8(a)(1) of the Act.

3. By the failure to timely furnish to the Union the following information after the strike commenced, the Respondent has violated Section 8(a)(1) and (5) of the Act:

> a) Rates of pay, job classifications and dates of hire of replacement employees.
>
> b) Rates of pay and classifications of all employees permanently transferred into bargaining unit jobs.
>
> c) Names of any bargaining unit employes terminated since 8/30/89 and the reasons therefore.

4. By refusing to furnish to the Union information about customer returns which information is relevant to the Company's proposed quality bonus plan, the Respondent has violated Section 8(a)(1) and (5) of the Act.

5. By withdrawing recognition from a portion of the bargaining unit encompassing waste water technicians, the Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally increasing employee contributions for health insurance benefits on March 1, 1989, the Respondent has violated Section 8(a)(1) and (5) of the Act.

7. By unilaterally changing work schedules of certain of its employees in June 1989, the Respondent has violated Section 8(a)(1) and (5) of the Act.

8. By enforcement of a no-solicitation rule disparately and discriminatorily against employees who engage in union solicitations and activities, the Respondent has violated Section 8(a)(1) of the Act.

9. By discharging Margaret Lewis on June 15, 1988, because of her union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

10. By issuing a verbal counseling and a written warning to Frank Blazi Jr. respectively on February 24 and 27, 1989, because of his union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

11. By refusing to give Frank Blazi Jr. an outstanding rating with a concomitant merit raise because of his union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

12. By issuing a warning to Javiar Cruz on February 24, 1989, because of his union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

13. By notifying Joseph Wingate that his absence from work on February 24, 1989, was not excused, in circumstances where the Respondent had been given advance notice that Wingate would be attending a union meeting, the Respondent has violated Section 8(a)(1) of the Act.

14. By issuing warnings and a 3-day suspension to Lonnie Hailey respectively on February 28, May 3, and August 25, 1989, because of his union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

15. By discharging Lenora Daniels on April 26, 1989, because of her union activities the Respondent has violated Section 8(a)(1) and (3) of the Act.

16. By giving Rose Puccino a 3-day suspension on May 9, 1989, because of her union activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

17. By failing to pay accrued vacation benefits to strikers until June 1, 1989, the Respondent has violated Section 8(a)(1) and (3) of the Act.

18. The strike which commenced on September 11, 1989, was caused, at least in part by the aforesaid unfair labor practices and was an unfair labor practice strike.

19. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

20. The following unit constitutes a unit appropriate for collective bargaining:

> All full time and regular part time production and maintenance employees employed by the employer at its North Haven Connecticut facility including employees involved in the production of products for Mint-Technologies, Inc., chemical technicians and waste water treatment technicians; but excluding all other employees, lead person, office clerical employees and guard, professional employees and other supervisors as defined in the Act.

21. Except as found herein the Respondent has not violated the Act in any another manner encompassed by the complaints.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Margaret Lewis and Lennora Daniels, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, Respondent must expunge from its files any references to these discharges and notify the employees that this has been done and that the discharges will not be used against them in any way.

The Respondent having discriminatorily given 3-day suspensions to Lonnie Hailey and Rose Puccino, it must make them whole, with interest, for their lost earnings and must expunge those suspensions, removing from it files any references to these unlawful suspensions and giving notice to the employees that this has been done and that such suspensions will not be used against them in any way.

Similarly, as I have concluded that the Respondent has, for dicriminatory reasons, issued warnings to Frank Blazi, Lonnie Hailey, and Javiar Cruz, as described in the Decision, it must expunge those warnings and give notice to the affected employees that this has been done and that such warnings will not be used against them in any way.

As I have concluded that the Respondent refused to give an outstanding rating to Frank Blazi because of his union activities, it is required that the Respondent change his job evaluation rating to outstanding and make him whole, with interest, for the merit increase that he otherwise would have received.

Regarding Joseph Wingate, the Respondent must change its records to reflect that his absence on February 24, 1989, was excused.

Having found that the Respondent has refused in timely fashion to furnish information relevant for bargaining, the Respondent must furnish upon request, such information concluded to have been unlawfully withheld. Regarding information about customer returns, the Respondent must furnish such information for any 3-year period selected by the Union, assuming that such information for the requested years is available.

I have concluded that the Respondent unlawfully refused to allow a health and safety expert chosen by the Union to inspect its plant. In order to ensure that there is no undue disruption of the Company's operations, the parties are directed to meet to decide such reasonable times and places when such inspection or inspections shall take place.

With respect to the unilateral change in the work schedule, the Respondent has already restored the preexisting schedule and therefore affirmative action in that respect is required. However, as it appears that at least some of the affected employees may have been denied overtime pay as a consequence, they should be made whole with interest.

I have also concluded that the Respondent unilaterally and unlawfully increased employee contributions for medical insurance on March 1, 1989. Therefore, the Respondent is required to reimburse all affected employees for such increased contributions retroactive to March 1, 1989. Additionally, as the subsequent interim agreement between the Union and the Company to share the added costs was made as a consequence of the Respondent's illegal unilateral action, it is my opinion that the interim agreement is terminable at the option of the Union. If such option is exercised by the Union, then the Respondent shall be liable for the increased employee contributions for medical insurance from March 1, 1989, until such time as a new interim agreement is reached on this subject, or until a final collective-bargaining agreement is reached and executed, or until such time as the parties have bargained in good faith and reached an impasse regarding medical insurance.

Regarding the delay in paying the strikers their accrued vacation pay, it appears that such payments were made in June 1989. However, as there might be some disputes as to whether particular employees received he correct amounts, I shall leave any such disputes for the compliance stage of the proceeding.

Having concluded that the strike which commenced on September 1, 1989, was an unfair labor practice strike, I shall order the Respondent to reinstate the strikers if and when they make offers to return to work, dismissing if necessary any employees hired after September 11, 1989. In this respect, the Board in *North American Coal Corp.*, 289 NLRB 788 (1988), adopted the judge's recommended Order which provided for a reinstatement remedy even where the unfair labor practice strikers had not yet offered to return to work. The administrative law judge at footnote 18 stated:

> North American argues that it is premature to consider in this proceeding whether the strike is an unfair labor practice strike since the strike is ongoing and since (as of the end of the hearing, at least), no employees have made unconditional offers to return. And it is true that the General Counsel could properly have litigated in a subsequent proceeding the question of whether the strike is an unfair labor practice strike. E.g., *International Business Systems*, 258 NLRB 181, 193 (1981) . . . . But the Board long ago concluded that an appropriate alternative approach is to deal with that question in the proceeding that considers the actions alleged to constitute the underlying unfair labor practice even though the strike is then still underway. *J.H. Rutter Rex Mfg. Co.*, 115 NLRB 388, 414 (1956), enfd. 245 F.2d 594, 597–598 (5th Cir. 1957).

However, to the extent that there are any claims that certain strikers are not entitled to reinstatement because of strike misconduct or other valid reasons, those issues are left to the compliance stage of this proceeding. *Windham Community Memorial Hospital*, 230 NLRB 1070 (1977).

Finally, I have concluded that the Respondent has unlawfully withdrawn recognition from a part of the bargaining unit when it created the position of waste water treatment technician and refused to bargain in relation to those employees. As I have found that this new job category encompassed work which previously had been part of the bargaining unit, and as I have found that there was no significant change in job duties, this ''new position constitutes an accretion to the certified collective-bargaining unit. Accordingly, I shall mod-

ify the unit to include the job category of waste water treatment technician.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, Circuit-Wise, Inc., Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Preventing a union-designated employee from speaking with or questioning other employees during safety inspection tours conducted by the Occupational, Safety and Health dministration (OSHA).

(b) Refusing to allow a union-designated expert to visit the plant for the purpose of making a safety inspection.

(c) Failing to timely furnish to the Union the following information after the strike commenced;

> (1) Rates of pay, job classifications and dates of hire of replacement employees.
>
> (2) Rates of pay and classifications of all employees permanently transferred into bargaining unit jobs.
>
> (3) Names of any bargaining unit employees terminated since 8/30/89 and the reasons therefor.

(d) Refusing to furnish to the Union information about customer returns which information is relevant to the Company's proposed quality bonus plan.

(e) Withdrawing recognition from a portion of the bargaining unit encompassing waste water treatment technicians.

(f) Unilaterally increasing employee contributions for health insurance benefits.

(g) Unilaterally changing work schedules of its employee

(h) Enforcing a no-solicitation rule disparately and discriminatorily against employees who engage in union solicitation and activities.

(i) Discharging employees because of their union or protected concerted activities.

(j) Issuing warnings, suspensions, or other disciplinary actions to employees because of their union or protected concerted activities.

(k) Refusing to give employees deserved job evaluation ratings and concomitant merit raise because of their union or protected concerted activities.

(l) Notifying employees that their absences are not excused in circumstances where the Respondent had been given advance notice that such employees would be attending union meetings and in the absence of a demonstrated need for such employees to be at work.

(m) Failing to pay accrued vacation benefits to employees because they are engaged in a strike.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full time and regular part time production and maintenance employees employed by the employer at its North Haven Connecticut facillity including employees involved in the production of products for Mint-Technologies, Inc., chemical techninicians and waste water treatment technicians; but excluding all other employees, leadperson, office clerical employees and guard, professional employees and other supervisors as defined in the Act.

(b) Offer immediate and full reinstatement to Margaret Lewis and Lennora Daniels to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Rescind the 3-day suspensions of Lonnie Hailey and Rose Puccino and make them whole with interest, for any loss of earnings or other benefits suffered in the manner set forth in the remedy section of the decision.

(d) Remove from its files any references to the unlawful discharges, suspensions, and warnings respectively given to Margaret Lewis, Lennora Daniels, Lonnie Hailey, Rose Puccino, Frank Blazi Jr., and Javiar Cruz, and notify these employees, in writing, that this has been done and that the disciplinary actions will not be used against them in any way.

(e) Change its record regarding Joseph Wingate, to reflect that his absence on February 24, 1989, was excused.

(f) Change the May 1989 evaluation of Frank Blazi Jr. to outstanding and make him whole, with interest, for any loss of earnings or benefits that he suffered.

(g) Upon request, meet with the Union to decide on reasonable times and places when the Union can have its designated health and safety expert visit and inspect the plant.

(h) Upon request, furnish to the Union, in the manner set forth in the remedy section of this decision the information found to have been unlawfully withheld.

(i) Make whole, with interest, any employees who as a result of the change in work schedules in June 1989, lost overtime pay.

(j) Reimburse all employees, with interest, from March 1, 1989, for the increased contributions deducted from their pay for medical benefits. In the event that the Union wishes to revoke the May 1989 interim agreement, the Respondent shall reimburse the employees for their share of the increased medical coverage contributions from March 1, 1989, until such time a new interim agreement regarding medial benefits is reached, or until a final collective-bargaining agreement is reached and executed, or until the Respondent bargains in good faith until impasse about medical coverage, whichever occurs first.

(k) Offer to the strikers upon application, reinstatement to their former or substantially equivalent jobs without prejudice to their seniority or any other rights and privileges, and

[22] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

dismiss if necessary any strike replacements hired after the strike commenced on September 11, 1989.

(l) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all ther records necessary to analyze the amount of backpay due under the this of this Order.

(m) Post at its facility in New Haven, Connecticut, copies of the attached notice marked ''Appendix.''[23] Copies of the notice, on forms provided by the Regional Director for Region 34 after being signed the Respondent's anthorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(n) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''